No. 577.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY AND ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, PETITIONERS,

VS.

E. B. SPILLER ET AL, RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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SUBJECT INDEX

Table of Cases Cited

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STATEMENT.

The trial court sustained exceptions to those parts of the Master's report which were inconsistent with the views expressed in his memorandum opinion. The facts stated by the trial court in his memorandum opinion are in harmony with the facts found by the Master. All of the findings of fact by the Master are consistent with the memorandum opinion. The trial court disagreed with the Master only in his conclusions of law. Therefore, no exceptions were sustained to the findings of fact of the Master and those findings of fact constitute the facts in the case in this court. The Circuit

Court of Appeals adopted the findings of fact of the Master and state: "The findings of the Master and the statement by the trial court have little in dispute as to the controlling facts." The statement of facts in the brief for petitioners (R. pp. 1-3 & 7-20) omits facts essential to a fair determination of the case, which are:

(1) In the original creditor's bill, filed in this case, on May 27, 1913, by the North American Company, a general creditor, it was averred (R. pp. 6-7) *that it was necessary to maintain the railroad property as a unit* and the prayer of the bill (R. p. 9) was to that effect. On the same day, (R. p. 11) the railroad company appeared by its counsel and by motion consented to the order appointing receivers for it, who under said order took possession of all of the property of said railroad company *for the benefit of its creditors, as their interests might appear,* and so operated said road.

(2) On April 3, 1914, a like bill was filed by another creditor, containing similar averments as *to the necessity for maintaining the railroad property as a unit* and a similar prayer, which bill was consolidated with the above.

(3) On May 22nd, 1914, the trustees under the general lien mortgage of the railroad company, dated August 27, 1907, filed a bill for foreclosure with like averments *as to the necessity for maintaining the railroad property as a unit and a like prayer.*

(4) On July 9, 1914, the trustees of the railroad company's refunding mortgage, dated June 20, 1901, filed a bill for foreclosure, *with like averments as to maintaining the railroad property as a unit and a like prayer.*

(5) The four above suits, in all of which the same receivers had been appointed, were consolidated into a single suit, entitled "*North American Company, Complainant,* v. *St. Louis and San Francisco Railroad Company, Defendant, No.*

4174, Consolidated Cause Final," and the final decree of foreclosure and sale was rendered in this consolidated cause and in each of its constituent causes (R. p. 591).

(6) Until the receivers were appointed, under the bills filed on May 22, 1914 and July 9, 1914, by the trustees respectively under the general lien mortgage and under the refunding mortgage, the income of the road was not impounded for the benefit of the respective bondholders. By interlocutory decree, the income was impounded May 29, 1914.

(7) The bi-monthly reports of the Special Master, appointed in the original cause and subsequently in the consolidated cause, are found (R. pp. 559-579) and cover the period from May 28, 1913, (the day after the appointment of the receivers under the original bill) to April 30, 1914.

An analysis of the first bi-monthly report (R. pp. 565-6) will show that the receivers collected on accounts "accrued prior to the appointment of receivers and collected under receivership," the sum of $2,245,153.79 from May 28, 1913 to June 30, 1913 beginning with the cash balance, on May 27, 1913, of $603,849.96, and during the same period collected from accounts "accrued and collected under receivership" the sum of $3,324,632.06, or a total from both sources of $5,-569,785.85; whereas the disbursements (R. p. 519) show disbursements made on account of debts accrued, prior to the appointment of receivers, to the extent of $3,985,121.02, and disbursements for debts accrued under the receivership, $950,-821.11, or a total disbursement of $4,935,942.13, leaving a cash balance on June 30, 1913, of $633,843.72.

It will be observed under the above table (R. pp. 565-6) that, during the period from May 28, 1913 to June 30, 1913, from the sums of money collected from accounts, both prior and subsequent to the receivership $3,985,121.02 was disbursed to pay debts accrued prior to the receivership, but

an analysis of this disbursement will show that $3,976.03 was paid out for material and supplies. Taxes, $584,526.58. Interest coupons $1,419,427.43. Interest rental $93,548.39, or a total of $2,101,478.43, all paid on debts accrued prior to appointment of receivers and every cent of which enured to the benefit of the bondholders of the road. Deducting this amount from the $2,245,153.79 collected from accounts, accruing prior to the receivership, the balance is $143,675.36.

An analysis of the five succeeding bi-monthly reports will show large cash balances ranging from $1,964,309.60, on August 31, 1913 (R. p. 569), to $990,612.74 on April 30, 1914 (R. p. 579) with the smallest cash balance $681,163.58, on October 31, 1913 (R. p. 571). An analysis of these bi-monthly reports will show millions of dollars diverted from income for the benefit of the bondholders, prior to their impounding said income under said two bills above referred to. As well stated in the case of *Love* v. *North American Company*, (C. C. A. 8th Circuit, December 4, 1915) 229 Fed. 103, l. c. 106:

> "When the receivers (of the Frisco Railroad Co.) were appointed, they received from the Frisco Co. as shown by their first bi-monthly report over $600,000.00 in cash. It also appears that, eliminating all items except current receipts and current expenses, the earnings and operating expenses of the Frisco Company, from May 27, 1913 to April 30, 1914 (all prior to any action by the bondholders), were as follows:

Earnings	$48,380,219.06
Operating expenses	35,449,360.17
Leaving a balance over operating expenses of	$12,930,858.89"

The court then asked (l. c. 106) to whom the excessive freight charges, paid by Love, belonged, and, after dis-

cussing the matter and pointing out the identity of the money, so collected, as having passed into the treasury of the company and into the hands of the receiver, added:

> "That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. *It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity,* that court, as a court of conscience, can do no less than direct its restoration" (italics ours).

(8) The very purpose of the reorganization scheme under this receivership was to perpetuate the ownership of the railroad company by its original stockholders and bondholders, which is shown by the plan of reorganization, set out in full in the record, prepared by the reorganization managers, J. & W. Seligman & Company and Speyer & Company, bankers, dated November 1, 1915 (R. pp. 341-433).

The "Reorganization Agreement" included in the reorganization plan (R. p. 402) recited an agreement, dated November 1, 1915, "between J. & W. Seligman & Co., and Speyer & Co., respectively co-partnerships, hereinafter called the reorganization managers, parties of the first part, and holders of the bonds, trust certificates and stock hereinafter mentioned, who shall become parties to this agreement as hereinafter provided, their successors and assigns, and the holders of certificates of deposit issued under or subject to the plan, hereinafter collectively called depositors, parties of the second part," and this agreement (R. p. 403), set out what bonds, trust certificates and stock might be deposited under said plan.

This plan of reorganization was submitted to the Public Service Commission of the State of Missouri (R. pp. 467-481) and the opinion of the Commission is set out in the record (R. pp. 482-536) and supplemental report of the Commission (R. pp. 536-548). The Public Service Commission of Missouri made another report in this matter (R. pp. 548-554).

This plan and these opinions show a typical case of railroad reorganization for the benefit of its original stockholders and bondholders, and the statement of Judge Hook, administrative judge in the Missouri-Pacific Railroad receivership, in case of *Guaranty Trust Co.* v. *Mo. Pac. Ry. Co.*, 238 Fed. 815, as to the real character of these reorganizations effected through federal receivership, is very pertinent.

(9) Under the final decree of foreclosure in the consolidated suit all the property of the Railroad Company was sold in four separate parcels, as appears from said Record (R. pp. 615-16 Final Decree) and from an indenture, dated September ...., 1916, between Thos. T. Fauntleroy, Special Master, appointed to make the said sale, the St. Louis & San Francisco Railroad Company, party of the second part, its three receivers, parties of the third part, and the trustees under the general lien mortgage of the Railroad Company dated August 27, 1907, parties of the fourth part (R. pp. 700, 703, 705). The first two sales were under collateral trust agreements, covering a large amount of securities, and each sale was made for the sum of $10.00. The third sale was under a collateral note and was made for the sum of $600,000.00, and the fourth sale was of all the remaining property of every character and description of the Railroad Company as an entirety, for the sum of $45,700,200.00, which consideration was paid by turning

over to the Special Master, to be cancelled or credited, as provided by said final decree, bonds and coupons to be paid out of the proceeds of sale on distribution thereof, as set forth in said final decree, or the Special Master was authorized to accept a receipt for a sufficient amount of said bonds to cover said consideration, and said bonds were delivered accordingly as per said receipt (R. pp. 682-3 Order Confirming Sale).

Under these sales the continuity of ownership, carefully worked out in the plan of reorganization, was preserved and the stockholders of the old company, as found by the Special Master in his report in this case (R. p. 160), received $45,650,000 of the stock of the new company under the reorganization plan, as representing their equity in the properties *without the payment of anything by them therefor,* which finding is adopted in the opinion of the Circuit Court of Appeals (R. pp. 747, 767).

ADDITION TO PARAGRAPH (9)

No offer of any kind was made to these intervenors nor was their claim listed by the receivers as requi ed by the final decree.

"It is conceded in the record that interveners had no actual notice or knowledge of the interlocutory decrees, or of the final decree, until August , 1916." (Opinion of C.C.A., R.p. 752, 14 Fed. (2nd) l.c. 290)

e reorganized Railway Company, largely in excess of the claims of intervenors."

The Special Master's Report (Rec. p. 163) shows that there was not a year, from June 30, 1906, to May 27, 1913, the date of the consent receivership, except the year end-

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(10) "It is established by the record here that, at all times after the excessive freight charges were collected and down to the receivership, the Railroad Company had in its treasury money in excess of the claimed overcharges, and that it turned over to the receiver some $300,000.00" (Opinion of the U. S. Cir. Ct. of Apps., R. p. 747).

The court found as a fact (Rec. p. 747) that in addition to this $300,000.00 "a large amount of cash (shown by the record to be over $5,000,000.00 (Special Master's Report, p. 165)) was also turned over by the receivers to the reorganized Railway Company, largely in excess of the claims of intervenors."

The Special Master's Report (Rec. p. 163) shows that there was not a year, from June 30, 1906, to May 27, 1913, the date of the consent receivership, except the year end-

ing June 30, 1908, when the operating income exceeded operating expenses, including taxes, by $9,944,600.89, that the operating income of the Frisco Company did not exceed its operating expenses, including taxes, by over $11,000,000.00 (R. p. 163).

The Special Master also finds (Rec. p. 163) that the operating income of the Frisco Railroad Company from June, 1906, to May 27, 1913 (the date of the consent receivership), was over $92,000,000.00; that, during the receivership, the operating revenues largely exceeded the operating expenses, including taxes. "The receivers turned over to the Railroad Company (the new company) over $5,000,000.00, after *paying out large sums of money from operating income as interest on bonded indebtedness and for betterments to the road and to the equipment, and for the purchase of new equipment*" (Rec. p. 186).

(11) On February 21, 1921, Judge Sanborn sitting in the United States District Court after full argument (the attorneys for the Frisco Railway Company, opposing leave to intervene) entered an order (R. p. 13) allowing E. B. Spiller, *et al.*, to intervene in said consolidated cause and rendered the following memorandum opinion: On February 12, 1921 (Rec. pp. 13-14) upon which said order, granting leave was based:

> "Sanborn, Circuit Judge:
>
> In view of the opinion in *Love* v. *North American Company*, 229 Fed. 123, and of the averments of the applicants, that on account of the necessity of first establishing their claims by the findings and orders of the Interstate Commerce Commission they could not have enforced them in the foreclosure proceedings at any time before February 1, 1916, the limit of the time fixed for presenting claims by the orders in those proceedings, that they have been diligently establishing these claims by necessary litigation before the Interstate Commerce

Commission, the District Court and the Supreme Court, and that they notified the attorneys for the purchasers at the foreclosure sale before they paid for their purchase of their claims and their intention to press them, the court is not persuaded that they are barred in this court of equity from a presentation and consideration of their claims either by the orders limiting the time within which claims were to be presented in the foreclosure proceedings or by the inexcusable laches of the applicants."

Subsequently, on March 10, 1921, Judge Sanborn, after hearing arguments (the attorneys of the Frisco Railway Company opposing leave to intervene) permitted supplemental intervening petitions to be filed by E. B. Spiller and E. B. Spiller, et al. (R. pp. 91, 93-94).

When said interventions were tried before the Special Master, a stipulation as to certain facts was made and filed as evidence in the case, (Rec. pp. 329-333). Paragraph 1 of the stipulation relates to the four separate bills filed, under all of which receivers were appointed, the consolidation thereof and the entry of the interlocutory decree *on May* 29, 1914 "*impounding the property of defendant for the payment of its debts and obligations.*"

Paragraph 2 (Rec. pp. 329-332) is as follows:

> "That the gross receipts of defendant during each year from June 1st, 1906, to May 27th, 1913, exceeded defendant's operating expenses during each such year in an amount in excess of interveners' claims, including interest thereon; that during each of said years within said period defendant expended large sums of money in making improvements to its lines of railroad and equipment and in paying interest on its bonded indebtedness, and during each of said years during said period expended large sums of money in current expenses incurred in the ordinary operation of its lines of railroad; that during each of said years within said period defendant at all times had in cash on hand an amount of money in excess of said claims of interveners with interest there-

on; that during the period of the receivership of the property of defendant, to-wit: May 27th, 1913, to January 29th, 1918, the gross operating receipts of said receivership during each of said years within said period were in excess of the operating expenses of said receivership, such excess amounting during each of said years to more than the total of the claims of interveners herein with interest; that during the period of said receivership, said receivers paid out under orders of said court large sums of money for improvements and betterments to the property and equipment of defendant, and large sums of money to bondholders of defendant by way of interest on its bonded indebtedness; and during each year within said period said receivers paid large sums of money incurred as current expenses for the operation of the lines of railroad of defendant during said receivership; that the alleged overcharges constituting interveners' demands were not kept by defendant in a separate or designated account or fund, nor where they separated from other gross receipts of defendant derived from the operation of its lines of railroad; that said moneys so collected by defendant were deposited in banks with other moneys of defendant in defendant's general account and said banks had no instructions from defendant to keep said moneys in a specific fund nor to refrain from paying same out in the ordinary course of business on defendant's checks against its funds in said banks, nor did said banks keep said moneys in a separate account, and that defendant checked out of its deposits in each of said banks during each year from June 1st, 1906, to May 27th, 1913, sums of money largely in excess of said alleged overcharges, and deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges; that upon the appointment of said receivers, defendant turned over to said receivers and said receivers received from defendant in cash, the sum of approximately three hundred thirty-four thousand dollars ($334,000.). The term 'large sums of money' as used in this paragraph II means at least several hundred thousand dollars."

The Special Master in his report (Rec. p. 153) finds that the Interstate Commerce Commission stated, on

August 16, 1905, its conclusion in its opinion in the case of *Cattle Raisers Association of Texas* v. *M. K. & T. Co. et al.*, 11 I. C. C. Rep. 296, l. c. 352, as follows:

> "It has been found that the advances made during the year 1903, as shown by the appendix were unjust and unreasonable, and that the present rates are unjust and unreasonable by the amount of said advances. The defendants should, therefore, be required to cease and desist from the maintenance of these rates. * * * All questions of reparation are reserved."

and reaffirmed this ruling, April 14, 1908, 13 I. C. C. 418.

This finding of the Master was adopted in the opinion of the United States Circuit Court of Appeals (R. p. 744) 14 Fed. (2d) 284, l. c. 285-6.

POINTS AND AUTHORITIES.

I.

The collection of said excess charges by the carriers from the intervenors in this case was under duress, or compulsion, the shippers being either required to pay such illegal exactions, or abandon their business.

> *R. R. Co.* v. *Lockwood,* 17 Wall. 379.
> *So. Pac. Co.* v. *Adjustment Co.,* 237 Fed. l. c. 962.
> *Love* v. *North American Co.,* 229 Fed. l. c. 106.
> *Spiller* v. *St. Louis & San Francisco R. R. Co. et al.,* Opinion of U. S. Cir. Court of Appeals (R. pp. 762-63) 14 Fed. (2d) 284, l. c. 294.

II.

(1) Section VI of the Commerce Act requires all railroads to publish their rates so as to secure uniformity and prevent discrimination among shippers, and as long as the published rate stands, the carrier must charge it and the shipper must pay it; but the mere publication of the rate does not determine its lawfulness under Section I of the act prohibiting unjust and unreasonable charges. If the published rates cannot be assailed because "lawful," then a Frankenstein has been created to destroy the act.

> *Arkansas Fuel Co.* v. *C. M. & St. P. Ry. Co.,* 16 I. C. C. Reports 95, l. c. 96, 97, 98; (decided Apr. 5, 1909).

Following the two earlier cases of

> *Poor Grain Co.* v. *Chicago, Burlington & Quincy R. R. Co.,* 12 I. C. C. Rep., 418, l. c. 421-423, 425 (decided July 8, 1907), and
> *Coomes* v. *Chicago, Milwaukee & St. P. Ry. Co.,* 13 I. C. C. 192, l. c. 194 (decided March 10, 1908), where the Commission say:

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II.

As to effect of published tariffs, or form of bill of lading filed therewith and incorporating an illegal provision, vid. Boston & Maine R.R. Company v. Piper, 246 U.S., 439, l.c. 445, 62 L.ed., 820, l.c. 823 -- holding such filing, or publication, does not validate an illegal condition contained therein.

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"Poor indeed would be the plight of shippers who have been compelled to pay excessive rates under such interpretation of the law."

(namely, that the *legal published* rate is always the *lawful* rate) which altereth not, and both of which cases distinguish between the legal, or published rate, and the lawful rate valid under Section I of the act. The commission in the Arkansas Fuel case applied the reparation rule, settled conclusively in

T. & P. R. R. Co. v. *Abilene Cotton Oil Co.,* 204 U. S. 426, l. c. 442.
Crescent Coal & Mining Co. v. *Chicago & Eastern Illinois R. R. Co.,* XXIV I. C. C. p. 149, l. c. 156-158; (decided June 8, 1912),

where the Commission again explodes the fallacy that because the published rate is *legal* under Section 6, and must, therefore, be collected by the carrier and paid by the shipper, it must be *lawful* under Section I. This early construction of the Act has never been questioned either by the Commission or this court. Judge Sanborn's opinion in this case is the only dissenting note. Also in the following:

Southern Pacific Co. v. *Darnell-Taenzer Lumber Co., et al,* 245 U. S. 531.
Mills v. *Lehigh Valley R. R. Co.,* 238 U. S. 473.
Phillips v. *Grand Trunk Ry. Co.,* 236 U. S. 662.
Darnell-Taenzer Co. v. *Southern Pacific Co.,* 221 Fed. l. c. 894.
L. & N. R. R. Co. v. *Schloss Sheffield Steel & Iron Co.,* 269 U. S. 222, 70 L. Ed. 245.
Baer Bros. Merc. Co. v. *D. & R. G. R. R. Co.,* 233 U. S. 479, l. c. 481-486.
Sections I, VI, IX and XXII, Act to Regulate Commerce.

(2) Receivers of carriers are specifically made liable to the provisions of the Interstate Commerce Act. Section 10, Section 19a, Paragraph (k), Section 20, Paragraph (5).

III.

The railroad company unlawfully exacted from these intervenors and their assignors the excess charges, which formed the basis of this action, and became a trustee *in invitum*, or *ex maleficio*, for their benefit. These trust funds passed into the hands of the receiver, and therefore should be returned to these intervenors by a court of equity.

Spiller v. *St. Louis & San Francisco R. R. Co., et al*, Opinion of U. S. Cir. Court of Appeals (R. pp. 760-764) 14 Fed. (2d) 284, l. c. 293, 295.
3rd Pom. Eq. Jur., Sec. 1055.
Love v. *North American Co.*, 229 Fed., l. c. 106.
White v. *Delano*, 270 Mo. 216.
Mercantile Trust Co. v. *St. Louis & San Francisco Ry. Co.*, 69 Fed. 193.
Angle v. *Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1.
Chapman v. *Douglass*, 107 U. S. 348.
Central Stock & Grain Exchange of Chicago v. *Bendinger*, 109 Fed. 926.
Richardson v. *N. O. Debenture Redemption Co.*, 102 Fed., l. c. 782.
Arkansas Fuel Co. v. *C. M. & St. P. Ry. Co.*, 16 I. C. C. Reports 97.
Southern Pacific Co. v. *Darnell-Taenzer Lumber Co. et al*, 245 U. S. 531.
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Sections I, VI, IX and XXII, Acts to Regulate Commerce.
39 Cyc. 591.
U. S. Bank v. *Bank of Washington*, 6 Pet. 17; 8 L. Ed. 299.
Olrichs v. *Williams*, 15 Wall., 221 L. Ed., l. c. 224.
Broom on Legal Maxims, 8th Ed., p. 191.
Pom. Eq. Jur., Vol. 1, Sec. 423.
Toledo A. A. & N. N. Ry. Co. v. *Penn. Co. et al.*, 54 Fed. 746, l. c. 751-752.
Southern California Railway Co. v. *Rutherford, et al*, 62 Fed., l. c. 797-798.

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IV.

Kansas City Terminal Ry.Co. v. Central Union Trust Co., 271 U.S.,p.445,l.c.452-456,70 L.ed.,1028, l.c.1031-2-3;

Pierce v. United States, 255 U.S.,398,l.c. 402-3, 404-5, 65 L.ed., 697, l.c. 702-704, especially where corporate debtor has knowledge of pending claim and stockholders of reorganized company, acquiring assets of old company, are volunteers, l.c. 403.

Veatch et al v. American Loan & Trust Co et al, 84 Fed.,274, (Circuit Court of Appeals, Eighth Circuit. December 6,1897 - Opinion by Brewer, Circuit Justice, concurred in by Sanborn and Thayer, Circuit Judges) l.c. 277.

Harrigan v. *Gilchrist*, 99 N. W. 909.
Sweet v. *Montpelier Savings Bank & Trust Co.*, 69 Kan. 641.
Matthews v. *Forslund*, 112 Mich. 591.
Barksdale et al v. *Finney et al*, 14 Grattan 338.
Williams v. *Young*, 81 Atl. 1118.
Traders Bank v. *Fraser*, 162 Mich. 315, l. c. 318.
Converse v. *Sickles*, 44 N. Y. Sup. 1080, affirmed in 161 N. Y. 666.
Sugar Refining Co. v. *Fancher*, 145 N. Y. 552, l. c. 561.
20 Corpus Juris, p. 21.
Dayton-Goose Creek Railway Co. v. *The United States*, 263 U. S. 455.
Section 15-A of the Act to Regulate Commerce.
Commonwealth ex rel v. *Scott*, 112 Ky. 252.

IV.

Intervenors without reference to their other equities, are entitled to recover these excess charges from the new company, the St. Louis, San Francisco Railway Co., under the rule announced in *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 481 and other cases to the same effect under Point I, *supra*, relating to the right of a creditor to recover against a reorganized company, where the stockholders of the original debtor company had been given an interest in the reorganized railway company—in the instant case over $45,000,000 in stock without the payment of anything therefor. This is particularly true where, as in the instant case, the purpose of the receivership was to preserve the railroad property as a unit, and it was sold as such and bought in as such by stockholders and bondholders of the original railroad company in order to preserve the continuity of ownership.

Central of Georgia Railway Co. v. *Paul*, 93 Fed. Rep. 878.
Northern Pacific Ry. Co. v. *Boyd*, 229 U. S. 481.
Northern Pacific Ry. Co. v. *Boyd*, 177 Fed. 804.

Guardian Trust Co. v. *Cambria Steel Co. et al.*, 210 Fed. 696.

Affirmed 240 U. S., page 166.

Walden v. *Bodley*, 14 Pet. 164, 10 L. Ed. 398.

Guaranty Trust Co. v. *Missouri Pacific Ry. Co.* 238 Fed. 812, l. c. 814-16.

McDonald v. *Nebraska*, 101 Fed. 171, l. c. 177-182.

Chicago Ry. Co. v. *Howard*, 7 Wall. 392, 409, 74 U. S. 392, 409, 19 L. Ed. 117.

Louisville Trust Co. v. *L. N. A. & C. Ry. Co.*, 174 U. S. 674.

V.

Intervenors are entitled to recover said excess charges upon the theory of the rule, underlying the right of preferential payment of claims for labor, supplies etc.

Love v. *North American Co.*, 229 Fed. 103, l. c. 107.

North American v. *Lamont*, 69 Fed. 496.

Southern Railway Company v. *Carnegie*, 76 Fed. 496.

Blair v. *Railway Co.*, 22 Fed. 471.

Atkins v. *Railroad Co.*, 3 Hughes 307.

Hale v. *Frost*, 99 U. S. 389.

Burham v. *Bowen*, 111 U. S. 776.

Union Trust Co. v. *Morrison*, 125 U. S. 591.

N. Y. Guaranty Trust Co. v. *Railway Co.*, 83 Fed. 365-370.

VI.

A court of equity, as a matter of public policy, will order said excess charges repaid to the intervenors, the shippers and representatives of shippers of live stock.

Blake v. *Railroad*, 19 Minn. 418.

Morgan v. *Louisiana*, 93 U. S. 217.

Southern California Railway Co. v. *Rutherford*, 62 Fed. 797.

Mercantile Trust Co. v. *St. Louis & San Francisco R. R. Co.*, 193.

Love v. *North American Co.*, 229 Fed. l. c. 107.

R. R. Co. v. *Lockwood*, 17 Wall. 279.

V.

Southern Railway Co. v. Carnegie Steel Company, 176 U.S., 257, 44 L.ed., 458, l.c. 273-279, l.c. 466-468. "Affirmed the opinion of the U.S. Circuit Court of Appeals for the 4th Circuit, 76 Fed., 492, supra."

...atch et al v. American Loan & Trust Co et al, 84 Fed., 274 (Circuit Court of Appeals, Eighth Circuit. December 6, 1897 - Opinion by Brewer, Circuit Justice, concurred in by Sanborn and Thayer, Circuit Judges) l.c. 277.

Farmers Loan & Trust Co. v. American Water Works Co., 107 Fed., page 23 (Circuit Court, D. Nebraska. March 30, 1895 - Opinion by Sanborn, Circuit Judge) l.c. 30-31.

VII.

As to election of remedies - Pierce v. U.S., supra, l.c. 404-405; Zimmerman v. Harding, 227 U.S., 489, l.c. 492-496, 57 L.ed. 608, l.c. 610-611

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So. Pac. Co. v. *Adjustment Co.*, 237 Fed. l. c. 962.
State ex rel Barker v. *R. R. Co.*, 216 Fed. 564.
U. S. & Mexican Trust Co. v. *Kansas City M. & O. Ry. Co., et al*, 240 Fed. 505.
White v. *Delano*, 270 Mo. l. c. 38.
And cases cited, *supra*, under Points III and V.

VII.

Neither the reorganization nor the trust fund theory is inconsistent with or abrogated by the remedy for the collection of overcharges, prescribed by Section 16 of the Act.

Spiller v. *St. Louis & San Francisco R. R. Co.*, Opinion of the U. S. Cir. Court of Appeals (R. pp. 764, 767) 14 Fed. 2d, 284 l. c. 295, 296.

Citing and applying *T. & P. R. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 l. c. 466, discussing Section 22 of the then act and the present act, providing:

> "And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

The court added, l. c. 295, that since the intervenors followed the only remedy provided by the act, to reduce the reparation order to judgment against the recalcitrant carrier, there could be no election, citing

20 C. J., 21,

and adding (l. c. 295-6):

> "Further, as said in 39 Cyc. p. 591: 'As a general rule the jurisdiction of equity in establishing and enforcing trusts is in addition to and concurrent with any remedies at law the party may have.' See, also, 6 L. R. A. (N. S.) 793; *Fitzgerrell* v. *Federal Trust Co.*, (Mo. App.) 187 S. W. 600; *Krippendorf* v. *Hyde & Another*, 110 U. S. 276, 4 S. Ct. 27, 28 L. Ed. 145."

See, also cases cited, *infra*, under Point IX.

VIII.

The claims of intervenors for said excess charges should be paid with interest from the date of their illegal collection.

> *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, l. c. 238, 239, 240,

where the court holds:

> "It has been the uniform practice of the Commission to recognize as an element of the damages, loss of interest on charges unlawfully exacted; and, in ordering reparation, it has usually included as a part of the damages such interest from the date of the payment."

Citing many cases of this court and of the Commission in the decision and in Notes 10 and 11 supporting this conclusion. This case conclusively settles the question of interest.

IX.

Since the entire case is before the court upon the writ of certiorari, the court will decide the entire case. Intervenors are entitled to recover attorneys' fees taxed as costs in the litigation in the District Court of the United States of the Western Division of the Western District of Missouri, because, pursuant to the order of the court, the receivers of the railroad company contested the claims of these intervenors in all the Federal District Courts and, thereafter, by the reorganized railway company for eleven years. In this way the costs were created, including attorneys' fees, which, under Section 16 of the Act, can be recovered as an incident to the enforcement of an order of reparation by judicial process.

In equity there is no wrong without a remedy. "Equity will do complete justice." "Equity delights to do justice and that not by halves." "Equity regards substance rather

VIII.

As to allowing interest, Missouri Pac. Rd. Co. v. Ault, 256 U.S., 554, l.c. 559,561,563, "Such damages may reasonably include interest and costs", l.c. 564.

Shreveport Creosoting Co. v. Louisiana & Pac. Ry. Co., Director General, as Agent, et al, opinion by full Commission, 92 I.C.C., 519, l.c. 524-527, citing and following Ault case, supra.

Crown-Williamette Paper Co. v. Director General, as Agent, 100 I.C.C., 397, l.c. 402, citing and following the Shreveport Creosoting Company case, supra.

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Harrigan v. *Gilchrist*, 99 N. W. 909.
Mercantile Trust Co. v. *St. Louis & San Francisco Ry. Co., Ogden et al., Intervenors*, 69 Fed. 193.
Sweet v. *The Montpelier Savings Bank & Trust Co.*, 69 Kan. 641 (77 Pac. 538).
Matthews v. *Forslund*, 112 Mich. 591.
Barksdale et al., v. *Finney, et al.*, 14 Grattan, 338.

X.

The intervenors are neither precluded by alleged laches from a recovery of the excess charges (held by the Commission to be 3¢ per cwt. in excess of a just and reasonable rate) and condemned by Section I of the Commerce Act as unjust and unreasonable and condemned by the common law, nor by any alleged bar arising out of the interlocutory decree or the final decree.

First Opinion of Judge Sanborn, (R. p. 61).
Report of Special Master (R. pp. 152-166; 168-173).
Opinion of the U. S. Cir. Court of Appeals (R. pp. 749-754).
Mathieson v. *Craven*, 247 Fed. l. c. 226.
Ide v. *Trorlicht, Duncker & Renard Carpet Co.*, 115 Fed. l. c. 148.
Texas & Pacific R. R. Co. v. *Abilene Cotton Oil Co.*, 204 U. D. 426.
Southern Pacific Co. v. *Goldfield Consolidated Milling & Transportation Co.*, 220 Fed. l. c. 18.
Northern Pacific Railway Co. v. *Boyd*, 228 U. S. 481.
Northern Pacific Railway Co. v. *Boyd*, 177 Fed. 804.
5 Pomeroy's Eq. Jur., Sec. 35.
Central Improvement Co. v. *Cambria Steel Co.*, 210 Fed. 696.
Central Improvement Co. v. *Cambria Steel Co.*, 201 Fed. 811.
Kansas City Southern Ry. Co. v. *Guardian Trust Co.*, 240 U. S. 164.
Swift & Co. v. *Black Panther Oil & Gas Co.*, 224 Fed. 20.

French v. *Capen,* 105 U. S. 509.
Rice et al. v. *Durham Water Co.,* 91 Fed. 434.
Southern Pacific Co. v. *Bogert,* 250 U. S. 482, l. c. 488-89-90; 61 L. Ed. 1107.
Coal Co. v. *Doran,* 142 U. S. 417.
Kansas City Southern R. R. Co. v. *May,* 2 Fed. 2nd Series, 680.
Ins. Co. v. *M. Girr,* 263 Fed. 847, l. c. 855.
Levee District v. *Pipe Line,* 292 Fed. 474, l. c. 480.
Williams v. *Young,* 81 Atlantic 1118.
Trader's Bank v. *Fraser,* 162 Mich. 315, l. c. 318.
Converse v. *Sickles,* 44 N. Y. Supp. 1080 (affirmed in 161 N. Y. 666).
Sugar Refining Company v. *Fancher,* 145 N. Y. 552, l. c. 561.

XI.

The decision of the Circuit Court of Appeals that intervenors' claims "arose" after the entry of the final decree, and that they were not precluded by the final decree and the order of confirmation of sale from asserting said claims, is correct on this point. Opinion of the United States Circuit Court of Appeals (R. pp. 755-760) 14 Fed. 2d, l. c. 291-293, where the court reviews the contention of petitioners on this point at length, states the applicable facts, holds that the purchaser of the property, the railway company, expressly agreed, under the order of court, to pay the claims of intervenors if established, and cites many applicable authorities as to the meaning of the term "arise."

ARGUMENT.

I, II, III.

The rates collected by the railroad company from these intervenors to the extent that they were unreasonable and unjust were unlawful and the exactions made by the railroad company from these intervenors over and above just and reasonable rates were unlawful exactions.

The Circuit Court of Appeals did not, as stated by petitioners' counsel, on page 22 of their brief, decide that the collection of legally-established rates becomes unlawful because such rates are subsequently found by the Commission to be unjust and unreasonable. The Circuit Court of Appeals decided that "The charging of an excessive and unreasonable rate is *ipso facto* unlawful." The correctness of its ruling in this regard is abundantly sustained by the decisions of this court, by reason and by the act to regulate commerce itself.

At common law unjust and unreasonable charges made by the carrier for transporting passengers or property were unlawful.

By Section I of the Acts to Regulate Commerce it is provided:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for receiving, delivering and handling of such property shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section VI of the Act to Regulate Commerce requires all railroads to publish their rates. As long as a rate is a

published rate a carrier cannot charge or demand or collect or receive a greater or less rate than the published rate. The published rate is the rate which the carrier must charge and the shipper must pay.

It is contended by the petitioners that if a rate is published in accordance with Section VI of the act, no matter how unreasonable or unjust it may be, it is a lawful rate.

They announce the novel theory that the act of a carrier in collecting an unjust and unreasonable rate from a shipper is lawful when committed, but assumes the nature of a tort because of a subsequent finding of the Commission that the rate was unjust and unreasonable. They do not try to explain how an act, entirely lawful when committed, can thereafter, become unlawful and tortuous. It is difficult to understand what they mean when they say that the act assumes the nature of a tort. How can a rightful, lawful act "assume" any other nature than that of a rightful and lawful act. Of course, their whole contention is without merit. The collection of an unreasonable and unjust rate is an unlawful act at the time the collection is made.

Petitioners' counsel quote from the opinion of Judge Sanborn filed in the district court (288 Fed. 612, Brief page 25) and say that the language of that learned judge is peculiarly apt. Let us analyze this excerpt from Judge Sanborn's opinion:

> "The prohibition of Section I and that of Section 6 must be read and interpreted together, and the correct construction of them is that the specific prohibition of Section 6 constitutes an exception from the general prohibition of Section I."

How can this be? Section 6 requires all carriers at all times to publish all of their rates. How, therefore, can the prohibition of Section 6 be an exception to the prohibition of

Section 1. How can the universal ever be an exception? The reasoning of Judge Sanborn in that part of the opinion immediately following the portion just quoted is equally fallacious. The carrier is not bound to publish an unjust and unreasonable rate. When it does publish such a rate it publishes it under the admonition of Section 1, which declares its act to be unlawful.

In enacting the Act to Regulate Commerce Congress had at least two principal objects in view, the prohibition of unreasonable and unjust rates and the prevention of discrimination of all kinds. These two objects are accomplished in Sections 1 and 6 of the act and full effect may be given to both of them. This same question has been before the Interstate Commerce Commission many times.

In those cases it was urged by the carriers that since the published rate was the legal rate the carrier in charging it was doing something that it had a lawful right to do, and that, therefore, in collecting that published rate they were not injuring the shipper and, therefore, since the shipper had suffered no wrong, he could not be entitled to reparation.

In passing on the proposition the Interstate Commerce Commission in *Arkansas Fuel Co.* v. *C. M. & St. P. Ry. Co.*, 16 I. C. C. Reports, p. 97, said, citing its two earlier decisions, *Poor Grain Co.* v. *C. B. & Q. Rd. Co.*, 12 I. C. C. 418, l. c. 425, and *Coomes* v. *C. M. & St. P. Ry. Co.*, 13 I. C. C. 192, l. c. 194:

> "It has been said that the word 'legal' looks more to the letter and 'lawful' to the spirit of the law; that 'legal' imports rather than the forms of law are observed and the rules prescribed obeyed, and the word 'lawful' that the act is rightful in substance. The two words may aptly be used as illustrative of the distinction that we have attempted to draw in the cases cited. It is provided in Section 6 of the act that no carrier shall collect or receive a greater or less compensation than the

rates specified in the tariff in effect at the time of the movement. Other provisions of law make it a misdemeanor for the carrier to depart from the published rate. In dealing with shippers the carrier is therefore required to conform the freight charges actually collected to the amount fixed in its published tariffs. In that sense the published rate in effect at the time of the movement is, therefore, the legal rate. It is what the letter of the law requires the shipper to pay and the carrier to collect.

"But the first section of the act, following the rule of the common law, declares that all charges for services rendered by carrier in the transportation of passengers or property shall be reasonable and just. It also declares every unjust and unreasonable charge for such a service to be unlawful. In publishing a rate or schedule of rates the carrier therefore acts under this admission of the statute. * * * While it may be, and indeed is, the legal rate—the rate that must be paid by the shipper and collected by the carrier because it is the published rate—the mere publication cannot make a rate lawful that is unreasonable and excessive."

This same question has been decided by this court and by the Circuit Court of Appeals on several occasions.

The case of *Southern Pacific Company* v. *Darnell-Taenzer Co.*, 245 U. S. 531, was a reparation case. In that case the excessive freight charge had been passed on by the shipper to the consumer and it was contended by the railroad company that the shipper had suffered no loss.

Mr. Justice Holmes said, page 534:

"The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. * * * *The carrier ought not to be allowed to retain his illegal profit*, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum" (italics ours).

If the exactions had not been unlawful, the claims could not have accrued at the time the exactions were made. The carrier receives the illegal profit when the exaction is made.

In this same case the court said:

> "But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss."

In the case of *Mills* v. *Lehigh Valley R. R. Co.,* 238 U. S. 473, which was a reparation case, the Interstate Commerce Commission had found that the shipper was entitled to the excess charges as reparation. It was contended by the railroad company in that case that this was not a finding that the shipper had been damaged.

Mr. Justice Hughes, on page 481, said:

> "What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction."

In the case of *Phillips* v. *Grand Trunk Ry. Co.,* 236 U. S. 662, a case in which recovery was denied because suit had not been filed within the time fixed by the statute, the court, through Mr. Justice Lamar, said:

> "But while every person who had paid the rate could take advantage of the finding that the advance was unreasonable, he was obliged to assert his claim within the time fixed by law. When the overcharge was collected a cause of action at once arose and the shipper at once had the right to file a complaint or to intervene in proceedings instituted by others."

The cause of action at once arose because the exaction was unlawful at the time it was made.

The Circuit Court of Appeals, in the case of *Darnell-Taenzer Co.* v. *Southern Pac. Co.*, 221 Fed. l. c. 894 said:

> "Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is *ipso facto* unlawful."

In the case of *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, the court said:

> "Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist *from violating the law*, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs *unlawfully suffered* from the application of the unreasonable schedule during the period when such schedule was in force" (italics ours).

A wrong cannot be unlawfully suffered if the act which causes the wrong is a lawful act. A carrier cannot be ordered by the Commission to desist from violating the law, if it is not violating the law.

All of these cases hold that the exaction of an unjust and unreasonable rate is an unlawful exaction, and unlawful at the time it is made. It can make no difference that in the interest of uniformity, a shipper, before he can bring his action to recover, must secure a finding of the extent to which the rate is unreasonable and unjust. The basic act itself is unlawful. The prescribed procedural steps cannot affect the situation.

Petitioners in their brief seem to blow hot and cold on this proposition. As we have seen they say that the act was lawful when it was committed; that the exaction of an unjust and unreasonable rate was lawful when it was committed, but assumed the nature of a tort after the Commission found that it was unjust and unreasonable.

In discussing the question of laches, later on in their brief (page 50) they say, that intervenors' claims arose in November, 1908 and prior thereto, that is, when the unjust and unreasonable rates were collected. They are right in their latter contention, and intervenors' causes of action accrued when the exactions were made, because the exactions were *ipso facto* unlawful. Aside from Section 1 of the Interstate Commerce Act, we have a legislative declaration of the unlawfulness "of an unjust and unreasonable rate."

Paragraph 17 of Section 15-A, which was added to the Interstate Commerce Act February 28, 1920, and which is commonly known as the recapture section of the act provides:

> "The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, *unlawfully excessive* or discriminatory rates."

A rate is excessive when it is unreasonable and unjust. When it is unreasonable and unjust it is unlawfully excessive.

Counsel for *amicus curiae*, Missouri Pacific Ry. Company, say that a railroad company, publishing a rate in good faith should not be penalized simply because it is an unjust and unreasonable one, by having its illegal profit declared to be a trust fund. Of course there is no merit in this contention. Why should a railroad company, regardless of its motives, be allowed to retain its "illegal profits"?

Have the shippers no rights? The bondholders have no right to the "illegal profits" because they did not contract for such security. The stockholders and general creditors have no right to such profits. Why should not a court of equity in a receivership prearranged for the benefit of the bondholders and stockholders, give to the shippers what is their own by the impressing of a trust? It is immaterial what the carriers' motives may be in publishing an unlawfully excessive rate. When it collects such a rate, it collects something that it is not entitled to, and it, as was said by this court in *Southern Pacific Company* v. *Darnell-Taenzer Co.*, *supra,* "ought not to be allowed to retain its illegal profit."

In this case it can hardly be said that the Railroad Company was acting in good faith. In August, 1905, the Interstate Commerce Commission, after a full hearing, found that the rates involved in this case were unjust and unreasonable to the extent of three cents a hundred pounds and were, therefore, unlawful. The unlawful exactions involved in this case were collected between August 29, 1906, and November 17, 1908. Therefore, this Railroad Company continued to make these unlawful exactions, not only in the teeth of Section 1 of the Act, but in the teeth of this positive finding of the Interstate Commerce Commission. This does not seem to us to comport with the good faith talked about by counsel. However, the motives of a carrier in publishing a rate are wholly immaterial.

The cases cited by petitioners in support of their contention that the Circuit Court of Appeals erred in its decision in this regard are either not applicable at all or they sustain the circuit court of appeals. As we have already seen the case of *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, recognizes the principle that the exaction of an unjust and unreasonable rate under the protection of a

published schedule is an unlawful exaction, and a violation of the law.

The question involved in that case was whether or not a shipper, under Section 22 of the Act, which provides:

> "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedy."

could bring and maintain a suit in court, before first obtaining from the Commission a finding that the rate complained of was unreasonable and unjust and a finding as to the extent to which such rate was unreasonable and unjust.

The court points out that one of the primary objects of the act to regulate commerce was to obtain uniformity and to prevent discrimination of all kinds; that, if such a suit could be maintained, then one shipper in one court could get one result and another shipper in another court another result; that by collusive action between some shippers and the carriers favorite shippers would be really charged one rate and other shippers another rate, and that thereby this primary object of the act would be totally destroyed.

The court held, therefore, that, under Section 22 of the Act, only those common law remedies of the shipper were preserved to him which were not inconsistent with the primary purpose of the act, and that to preserve uniformity and to prevent discrimination all shippers would, before they could bring a suit in court, have to have a finding of the Commission that the rate complained of was unreasonable and unjust and the extent to which it was unreasonable and unjust.

In the case of *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, the plaintiff sued to recover

the difference between the published rate they paid and the lower rates which other shippers had paid because of rebates allowed to them on coal shipped between the same *termini.* The court held that in such case, previous action by the Interstate Commerce Commission was not a condition precedent to the maintenance of an action in the courts. There was no question as to whether or not the published rate was a reasonable rate or a just rate. The court said that it was extremely doubtful whether at common law a shipper, who had paid a reasonable rate, had a right of recovery because a lower rate was charged to another shipper, but that the statute had given the shipper such right, and that the measure of his recovery was the pecuniary loss suffered by him. While the court used the language quoted in the brief, that language was directed to the facts involved in that case and does not touch this case top, side or bottom. In that part of the opinion preceding the excerpt quoted in petitioner's brief the court said:

> "Under the statute there are many acts of the carrier which are *lawful or unlawful,* according as they are *reasonable or unreasonable, just or unjust.* The determination of such issues involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate regulating body, for the reasonableness of rates and the permissible discrimination based upon differences in conditions are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views that might be taken by different tribunals" (italics ours).

This case really sustains the decision of the Circuit Court of Appeals in the case at bar. If acts of the carrier

are lawful or unlawful according as they are reasonable or unreasonable, just or unjust, then when the carrier exacts an unjust and unreasonable charge for transportation, its exaction is unlawful.

The case of *Robinson* v. *Baltimore & Ohio R. R.*, 222 U. S., 506, involved the question as to whether or not under Section 22 of the Act, a shipper could have recourse to the courts because of an alleged discriminatory rate between coal loaded from wagons and coal loaded from a tipple without a prior determination by the Commission as to whether or not the rate was discriminatory and the extent to which it was discriminatory. The court, applying the rule laid down in the Texas & Pacific Railway case, *supra*, held that, since a right to appeal to the courts in such a case would bring about the same results as the right to appeal to the courts in advance of a finding by the Commission in cases of unreasonable rates, the plaintiff could not maintain an action in the courts without first obtaining the necessary findings from the Commission.

In the case of *Chicago, B. & Q. R. R. Co.* v. *Merriam Millard Co.*, 297 Fed. 1, the Interstate Commerce Commission made an order that the rate complained of would be unjust in the future to the extent stated in the order. The Commission did not order the inauguration of a new rate, but expressly stated that it expected that the carriers would put the new rate into effect. The carriers did not do so, and later on the Commission made another order establishing the rate for the future and gave the carriers thirty days to publish it. No application was made by the plaintiff for an order of reparation and no order of reparation was made by the Commission. The court held that without first having obtained an order of reparation the plaintiff could not main-

tain the suit. The statement of the court in that case that "the duly filed and published tariff rate while it was in force was the only lawful rate" was unnecessary to the decision of that case under the views announced by the court, and is *obiter*, and in our judgment, is in conflict with the decisions of this court and with the Commerce Act itself.

The excessive charges, collected by the railroad company in this case being unlawful, the railroad company, when it obtained the money of the shipper, became a trustee *ex maleficio* of the excessive charges and held the shipper's money, so collected, as a trustee for the shipper. It is well settled that where one wrongfully obtains the possession of another's property by fraud, duress or by taking advantage of another's weakness, the person thus taking the property holds it in trust for the other as a trustee *ex maleficio*. In 3 Pom. Equity Jur., Section 1053, the rule is thus stated:

> "In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of one who is truly and equitably entitled to the same."

That a railroad company and a shipper are not on an equal footing is too plain for argument. That a shipper who pays to a railroad company a rate in excess of a reasonable rate, is as to such excess, acting under practical duress is equally plain. A railroad company, therefore, which collects from the shipper an unreasonable rate is, as to the excess over a reasonable rate, a trustee *ex maleficio* for the shipper.

The rule announced in Pomeroy is universally approved. It is adopted in the following decisions:

Angle v. *Chicago, St. P. M. & O. R. Co.,* 151 U. S. 125, 38 Law Ed. 55.
Chapman v. *Douglas,* 107 U. S. 348.
Love v. *North American Company,* 229 Fed. l. c. 106.
White v. *Delano,* 270 Mo. 216.
Mercantile Trust Co. v. *St. Louis & San Francisco R. R. Co.,* 69 Fed. 193.
Central Stock & Grain Co. v. *Bedinger,* 109 Fed. 926.
Richardson v. *New Orleans,* 102 Fed. 782.

The authorities relied upon by the petitioners and cited in their brief relative to the tracing of trust funds had to do with cases of actual insolvency and with the actual distribution of the assets of those insolvents among their creditors. This is not such a case. This is a reorganization through the offices of a court of equity by means of a receivership to carry out and effectuate a prearranged plan under which the stockholders and bondholders of the old company were to own the property after the usefulness of the receivership ceased.

However, the respondents in this case, in the tracing of the moneys illegally exacted from them, have measured up to the rigid rule announced in those cases.

Let us examine the agreed statement of facts filed in this case (Record pp. 329-333). The parts of that stipulation relevant to this issue may be stated thus:

1st. That, at all times from June 1, 1906 to May 27, 1913, the Railroad Company had in cash on hand an amount of money in excess of the claims of intervenors with interest thereon.

2nd. That the overcharges constituting intervenors' demands were not kept by defendant in a separate or designated account or fund, nor were they separated from other

gross receipts of the Railroad Company derived from operation of its lines of railroad.

3d. That the moneys so collected by the railroad company were deposited in banks by the defendant in defendant's general account and that said banks did not keep said moneys in a separate account.

4th. That the Railroad Company checked out of its deposits in each of said banks during each year from June 1, 1906 to May 27, 1913, sums of money largely in excess of said overcharges.

5th. That said Railroad Company deposited in said banks during each of said years sums of money largely in excess of said alleged overcharges.

6th. That upon the appointment of the receivers, the Railroad Company turned over to said receivers, and said receivers received from the Railroad Company in cash, the sum of approximately $334,000.00.

We say that these are the relevant parts of the stipulation because it is wholly immaterial what instructions the banks had and it is wholly immaterial whether these overcharges were separated from the other gross receipts of the Railroad Company, derived from the operation of its lines of raiload, and it is immateial whether the banks kept said moneys in a separate account.

Petitioners seem to lay great stress upon the agreed fact that the Railroad Company paid out, during the period in question, large sums of money for current expenses incurred in the ordinary operation of its property. We think that under the undisputed other facts in the case, this fact is wholly immaterial. It would be presumed, if the fact had not been stipulated, that the Railroad Company paid out large sums of money for current expenses incurred in the ordinary

operation of its property. Current expense, of course, is operating expense, and there was not a year from June 30, 1906, until May 27, 1913, except one, that the operating income of the Railroad Company did not exceed its operating expense, including taxes, by over eleven million dollars. The only year that its excess of operating income over operating expense did not amount to over eleven million dollars was the year ending June 30, 1908, when the excess amounted to $9,944,-600.89 (Record p. 163).

The facts, therefore, as established by this stipulation are these—that from June 30, 1906 to May 27, 1913, the Railway Company at all times had on hand, in cash, an amount of money in excess of intervenors' claims with interest; that the illegal exactions from the shippers were deposited by the Railroad Company in banks, with moneys of the Railroad Company in defendant's general account; that, during all of said time, the Railroad Company checked out of its deposits in said banks sums of money largely in excess of the overcharges and during all of said time deposited in said banks sums of money largely in excess of said overcharges, and had on hand and turned over to the receivers at the time of their appointment, on May 27, 1913, $334,000.00.

The only inference, without straining the meaning of the language used in order to arrive at an inequitable result, that can be drawn from these agreed facts is that in none of the banks, in which the overcharges illegally exacted from the shippers were deposited, was the balance ever less than the amount of the overcharges deposited in that bank. The Railroad Company always had on hand more than the overcharges with interest. The overcharges were deposited in the banks with which the Railroad Company did business with moneys which actually belonged to the Railroad Company.

The deposits made from time to time equaled the withdrawals made from time to time and, therefore, the balances were never less than the amount of the overcharges.

On these facts and under the well-known rule approved by the authorities cited in the petitioners' brief, it will be presumed that the Railroad Company drew out of the banks its own money and left the trust company belonging to the shippers intact.

But, why should the strict rule applicable to actual insolvents, whose assets are actually being distributed by the court among the creditors of the insolvents, apply in all its strictness to this case? The railroad's operating income exceeded its operating expenses, including taxes, for a great many years by considerably over eleven million dollars. It had acquired two lines of road which, because of temporary conditions, were losing money, the Chicago & Eastern Illinois and the New Orleans, Texas & Mexico Railway Company, and it wanted to get rid of them (Bill of Complaint, Record pp. 2-4). A plan for the reorganization of the road, leaving these two roads out was agreed upon. A friendly creditor, who alleged that for the purpose of preserving the unity and integrity of the property of the Railroad Company it was necessary to have a receivership, brought an action in the Federal Court and prayed for the appointment of receivers. On the same day the Railroad Company joined with the complainant in a motion that the prayer in the bill for the appointment of receivers be granted (Record p. 11).

The receivers took charge and operated the properties profitably. In order to improve the property generally during the first two years of their operation, they increased the expenditures for maintenance of way and maintenance of equipment over three million dollars per year over what had been expended during the two years preceding the receiver-

ship (Record p. 478). They expended $8,155,939.24 in redemptionship of equipment trust obligations and for improvements and additions to property which was not taken into capital account. They turned over to the new company in excess of five million dollars in cash. The preferred stockholders of the old company participated share for share in the new company without paying anything for their new stock. The common stockholders received stock in the new company equal to 85% of their holdings in the old company without paying anything for it (R. p. 529).

We do not contend that the Railroad Company did not have a right to effect a reorganization with the aid of a court of equity. We do contend that the same strict rule relating to the tracing of trust funds should not apply to such reorganization as applies to actual insolvents actually distributing their assets among their creditors through a court of equity. Rules of equity are supposed to be rules of conscience and they vary with varying conditions and circumstances and cases. It is not so long ago that a trust could not be impressed upon money which the trustees had commingled with his own funds because the identical dollars could not be traced. Under modern conditions that rule was inequitable and it was modified accordingly. The rule commonly known as the six months rule relating to the payment for necessary supplies is a rule of very modern origin. This court has pointed out the differences between these two kinds of receiverships—*Louisville Trust Co.* v. *Louisville, etc., Ry.,* 174 U. S. 674, 43 L. Ed. 1130.

In that case, it was said:

> "We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean, not the destruction of all in-

terest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor, or mortgagor. * * * Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation."

In the case of *Chicago, R. I. & P. Ry. Co.* v. *Howard*, 74 U. S. (7 Wall.) 392, 409 (19 L. Ed. 117), it is said:

"Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation and recognizes the rights of creditors to pursue it into whatsoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the properties until the debts of the corporation are paid."

To the same effect are the following cases:

Montgomery-Web Co. v. *Dienelt*, 133 Pa. 585, 19 Atl. 428, 430.
Central of Georgia Ry. Co. v. *Paul*, 93 Fed. 878, 884 (Fifth Circuit).

In the case of *Mercantile Trust Company* v. *St. Louis, San Francisco Railroad Co.*, 69 Fed. 193, which arose under an earlier receivership of this same railroad, the court said:

"Two-fifths of all the money that went into the treasury of the company for fares of passengers represented unlawful and illegal exactions. That money it still has. No portion of it has been returned to the persons who were illegally forced to pay it. The sums

illegally exacted from the interveners have never been returned or tendered to them. It required eight years of litigation for the interveners to establish their own and the rights of the public in the premises. * * * When, as sometimes happens, a railroad company desires to avoid the payment of debts and obligations incurred in the operation of its road, or to reduce the wages of its employes below a fair and reasonable compensation for their services—there are not many such companies, but occasionally there is one—it seeks the aid of a friendly creditor, through whose agency it is quickly placed in the hands of a receiver, and immediately a court of equity is asked and expected to do the mean things which the company itself was unable or ashamed to do. But it is believed this is the first instance in which a court of equity has been asked to become, in effect, something bordering very closely on a receiver of stolen goods, and urged to hold the ill-gotten gains in trust for the guilty party, and refuse to make restitution even of the smallest portion of them to the persons from whom they were unlawfully taken. High considerations of public policy, not less than the plainest principles of equity and justice, demand that the property of the defendant company in the custody of the court as a trust fund should be made to respond to the payment of these judgments."

In commingling this trust money with its own money, the railroad company violated its duty as trustee and the courts, in order to correct this situation, indulge every presumption for the beneficiary. The proposition that no such narrow doctrine as that contended for by counsel for the petitioners is applicable to the receivership in the instant case is shown by the case of *Terre Haute and I. R. Co. v. Cox,* 102 Fed. Rep. 825 (7th Circuit). In that case, the railroad company leased from another railroad company a line of road on a profit sharing basis. The court held that the share of the gross earnings reserved to the lessor in that lease was a trust fund and that the bondholders of the lessor company, the interest on whose bonds

the lessee company was required by the terms of the lease to pay from such gross earnings, were entitled to have the reserved percentage of the earnings, misapplied by the lessee company, restored by the receiver notwithstanding the fact that the lessee company had commingled those funds with its own and had operated the railroad at a loss.

The court said:

> "But it is insisted by the Indianapolis Company that the excess of operating expenses over the earnings of the Peoria Railroad necessitated and justified the withholding of the thirty percentum, and the record shows that a large sum of money came into the hands of the receiver as a part of the estate at the time of their appointment. We may, therefore, we think, safely assume that that portion of the earnings which otherwise would have gone to the Peoria Company came into the hands of the Receivers, either as money at the time they took possession of the road, or as a benefit in virtue of the fact that they were consumed in the general operating expenses of the Indianapolis Company."

In that case, the court quoted from *Peters* v. *Bain*, 133 U. S. 670, 33 L. Ed. 696.

In this sort of a case, if in no other, the rule that where a trustee mixes trust funds with his own, the whole will be treated as a trust property, except so far as he, the trustee, may be able to distinguish what is his own, should be applied.

In the case of *Central National Bank of Baltimore* v. *Connecticut Mutual Life Insurance Co.*, 104 U. S. 54, 26 L. Ed. 693, this rule is stated thus:

> "That, so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and

> that if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own, are established doctrines of equity and apply in every case of a trust relation, and to moneys deposited in a bank account, and the debt thereby created, as well as to every other description of property."

The court, in this last cited case, reviews the English cases on this subject and points out that the original doctrine, requiring money to be earmarked, or specifically identified, had been abandoned in cases of trust relationship, and quotes from the opinion of Vice-Chancellor Sir W. Page Wood, as follows (l. c. 67):

> "Vice-Chancellor Sir W. Page Wood, in *Firth* v. *Cartland*, 2 Hem. & M. 420, said that *Pennell* v. *Defell* rested upon and illustrated two established doctrines. One was that 'So long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust.' The second is, 'That if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own.' "

And again the court (l. c. 700), (after quoting from the opinion of the Master of Rolls, Sir George Jessell), says:

> "He adopts the principle of Lord Ellenborough's statement in *Taylor* v. *Plumer*, 3 M. & S. 562, that 'It makes no difference in reason or law into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman*, Willes 400, or into other merchandise, as in *Whitcomb* v. *Jacob*, 1 Salk. 161, for the product or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained

> to be such, and the right only ceases when the means of ascertainment fail.' But he dissents from the application of the rule made by Lord Ellenborough when the latter added, 'which is the case when the subject is turned into money and confounded in a general mass of the same description,' for equity will follow the money, even if put into a bag, or an undistinguishable mass, by taking out the same quantity. And the doctrine that money has no earmark must be taken as subject to the application of this rule. The court of appeals had previously applied the very rule as here stated in the case of *Birt* v. *Burt*, reported in a note to Ex parte Dale & Co., L. R. 11 Ch. D. 773."

This case of *Central National Bank of Baltimore* v. *Connecticut Mutual Life Insurance Co.*, has been cited and followed by this court, by the lower federal courts and by nearly all of the state courts. It would be useless to attempt to give this vast mass of citations. We desire, however, to call the court's attention to the case of *Smith* v. *Township of Au Gres*, 150 Fed. 257, l. c. 260-265, (6th Circuit) and *Standard Oil Company of Kentucky* v. *Hawkins*, 74 Fed. 395 (7th Circuit).

The case of *Smith* v. *Township of Au Gres* contains an excellent discussion of the doctrine above announced and quotes from the opinion of Chancellor Kent in *Hart* v. *Ten Eyck*, 2 Johns, Ch. 62, l. c. 108, as follows:

> "If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it."

In the case of *Smith* v. *Mottley*, 150 Fed. 266 (6th Circuit) l. c. 268, the court refers to the Au Gres case, decided by it (150 Fed. 267) and reannounces the same doctrine, citing additional cases in support thereof.

The court said (l. c. 268) that it was shown that three times the amount of the trust fund claimed remained in the bank from the time of payment to the time of the assignment and came to the trustee. The court added:

> "The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner; but, when this is done, the burden shifts to the wrongdoer. It is for him to distinguish between his own property and that of the innocent party."

To revert a moment to the agreed statement of facts, and applying the rule announced in these cases, it was certainly the duty of the railroad company, if the balances in any of the banks were reduced below the amount of the overcharges deposited therein, to show such fact. This it did not do, but conceded that it always had on hand more than the amount of the overcharges, with interest, and that the deposits made from time to time in each of the banks into which overcharges had gone were equal to the withdrawals, and that it turned over to the receivers more than ten times the amount of the overcharges. It alone had the evidence and it is a fair inference that if the balance in any bank had been reduced below the amount of the overcharges in that bank, it would have shown that fact.

The cases cited by counsel for petitioners are not in conflict with the decision of the circuit court of appeals in this case or with the decision of the circuit court of appeals in the case of *Love* v. *North American Company*, 229 Fed. 103.

In the case of *City of Litchfield* v. *Ballou*, 114 U. S. 190, 29 Law Ed. 132, the city had issued bonds which this court held to be void, because they were issued in viola-

tion of the state constitution. Thereupon, the purchaser of the bonds brought a suit in equity on the theory that, notwithstanding the bonds were wholly invalid, the city was in possession of the money, received for the bonds, or its equivalent in property identified as having been procured with the proceeds of the bonds. The evidence showed that the money represented by the proceeds of the bonds had long since passed out of the hands of the city. However, the evidence showed that some of the proceeds of the bonds had gone into a water works plant. A large part, however, of the money, which had gone into the water works plant, was obtained by taxation, or from other resources of the city. It was not ascertainable how much. The land, on which the work was constructed, was purchased before the bonds were issued. The streets, through which the pipes were laid, were public property into which no money of the complainants had entered. In connection with the allegations in the bill that the city was in possession of the money, the court said (l. c. 133):

> "The money received by the city from Ballou has long passed out of its possession and cannot be restored to complainant. Neither the specific money nor any other money is to be found in the safe of the city or anywhere else under its control."

Speaking about the tracing of the money into the water works property, this court used the language set out in petitioners' brief. In this case respondents have traced their money into the treasury of the railroad company and from the treasury of the railroad company into the hands of the receivers, and from the hands of the receivers into the hands of the railway company, and have showed that the stockholders of the old railroad company obtained over forty-five million ($45,000,000.00) dollars of the stock

of the new railway company without paying anything for it.

Here respondents' money can be reclaimed and delivered without taking others' property with it and without injury to other persons, or interfering with others' rights. Moreover, the decree of the lower court appealed from in this Ballou case did not proceed upon the trust fund theory. It found a debt from the city to Ballou and impressed a lien upon the water works plant for the payment of that debt. This court held that that was as much within the condemnation of the constitutional provision as the express contracts evidenced by the bonds.

The case of *Schuyler* v. *Littlefield,* 232 U. S. 707, 58 Law Ed. 806, simply anonunces the familiar doctrine:

> "Trust funds deposited by a trustee in his individual bank account are dissipated if the mingled fund is at any time wholly depleted, and cannot be treated as reappearing in sums subsequently deposited to the same account."

The next case cited is *Empire State Surety Co.* v. *Carroll County,* 194 Fed. 593 (U. S. C. C. A., 8th Circuit).

In this case Judge Sanborn (l. c. 604-605) undertakes to announce the rules governing the enforcement of a trust against the proceeds of an insolvent estate in the hands of a receiver. After announcing the general rule:

> "It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver" (citing l. c. 604 and a number of cases),

the court stated (l. c. 605) the second rule on this subject, which is as follows:

"**Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the Receiver, not exceeding the smallest amount the fund contained subsequent to the commingling. (*Board of Com'rs* v. *Strawn*, 157 Fed. 49, 51, 84 C. C. A. 553, 555, 15 L. R. A. (N. S.) 1100; *Weiss* v. *Haight & Freese Co.*, (C. C.) 152 Fed. 479; *American Can Co.* v. *Williams*, 178 Fed. 420, 423, 101 C. C. A. 634, 637) as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred (*Board of Com'rs* v. *Patterson*, (C. C.) 149 Fed. 229, 232; *Spokane County* v. *First National Bank*, 68 Fed. 979, 16 C. C. A. 81).**"

The next case cited is the case of *Winfield* v. *Alva Security Bank*, 232 Fed. 847 (U. S. C. C. A., 8th Circuit). In this case the complainants had purchased forged notes from the cashier of the Alva Bank. The complainants had credited the Alva Bank with the purchase price of these notes. Subsequently, these credits were entirely exhausted by drafts and there was no evidence that any part of the fund ever reached the Alva Bank. What was said by the court in this Alva Bank case, after finding that there was no evidence that any of the proceeds of the forged notes ever reached the bank, may have been right on the facts in that case, but is not authority on the facts in this case. Whatever may have been the principles announced in that case, they are clearly inapplicable to a reparation case like this, the principles governing which have been stated by the United States Circuit Court of Appeals in this and the Love case. Certainly the robust morality of the opinion of the United States Circuit Court of Appeals in the instant case must appeal to all fair-minded persons. One of the deep-seated convictions of Congress, as reflected by its legislation name-

ly, the Carmack Amendment, and the Elkins Act, designed "to cut up by the roots every form of discrimination, favoritism, and inequality" (*U. S.* v. ***Koenig Coal Co.,*** U. S. S. C. Adv. Opinion, May 1, 1926, No. 12, p. 488, l. c. 490), and by the provisions of the Commerce Act, was to protect the shipper in the wholly unequal fight with the carrier. It is very easy for the carrier to get the shipper's money, and Congress, as shown by its legislation, as construed by this court, is determined that the shipper shall get it back, and has even gone to the extent of authorizing the assessment of attorneys' fees in favor of the defrauded shipper. It is the clear intent of Congress, as shown in the Commerce Act, to restore to the shipper all unjust and unreasonable charges, plus interest from the date of payment, and attorneys' fees, thereby penalizing the carrier and predisposing the carrier to treat the shipper fairly and not litigate his just claims with him, in season and out of season, day and night, Sundays and holidays, for a period of twenty-two years, during which time an opportune financial receivership is invoked to entirely defeat the shipper, though the stockholders of the railroad company in receivership are enriched at the expense of its creditors to the extent of over forty-five millions of dollars.

The next case cited is the case of ***Federal State Bank*** v. *McFarlin*, 257 (U. S. C. C. A. 8th Cir.).

This case involved the distribution of assets of a bankrupt grain company and announces the proposition, citing the Carroll Company and Alva Bank cases, *supra,* that a claimant, whose property has helped to swell the general assets of a party, subsequently becoming bankrupt, has no prior right in those general assets without specific identification or tracing of the claimant's property.

The next case cited, *Scullin Steel Co.* v. *North American Co.,* 255 Fed. 945 (U. S. C. C. A., 8th Circuit) merely announces the proposition that, where there is collusion and fraud between the agent of the shipper and the agent of the carrier, and the carrier had no notice of such fraud and was not enriched by it, the money so siphoned from the shipper could not be treated as a preferred claim over other creditors of the carrier.

The next case cited is *Weideman* v. *Newton Arms Co.,* 271 Fed. 302, 304 (C. C. A., 2nd Circuit), in which the court held that, where a trust claim was asserted on the ground that money had been secured from claimant by the false representations of a corporation, it was necessary to show, first, that such representations were relied on, and, second, trace their money into some particular property or fund which came into the hands of the receiver; and it is not sufficient to show that it was used by the corporation generally in its business.

In that case the court pointed out (l. c. 303) that the cash on hand had fluctuated down to zero, with liabilities of $400,-000.00, and that all that claimants could prove was that their money was spent in carrying on the business or procuring certain articles of machinery and the like which ultimately passed into the receiver's hands (l. c. 304).

How can this holding fit the facts in the instant case?

The next case cited is *Titlow* v. *McCormick,* 236 Fed. 209, l. c. 214, 215. This case involved the distribution of the assets of an insolvent bank, where a trust was asserted by one claimant. This case cites and follows (l. c. 211) the Schuyler case, 232 U. S. 707, analyzed *supra.* This case also announces the doctrine (l. c. 214) that, where a trust fund has been commingled with other funds, still claimant is en-

titled to recover if there remained in the possession of the bank a sum of money equal to the amount due him, *"It being the presumption of the law that, if moneys had been disbursed out of such fund, it was the money which the bank had the right to pay out, and not the money which was entrusted to it in a fiduciary capacity"* (italics ours). Again, l. c. 215, the court announces the same rule, quoting the case of *Brennan* v. *Tillinghast,* 201 Fed. 609-614 (C. C. A., 6th Circuit), where the court declared that, when trust funds were mingled with other funds there was a presumption of law *"That the sums first drawn out were for the moneys which the tort feasor had a right to expend in his own business, and that the balance which remained included the trust fund which he had no right to use"* (italics ours).

The next case cited on this point is the case of *U. S. National Bank of Centralia* v. *City of Centralia,* 240 Fed. 93 (U. S. C. C. A., 9th Circuit). This case involved the distribution of the assets of an insolvent bank in a receiver's hands, and announces (l. c. 95) this proposition:

> "The law impresses a trust upon funds (trust funds so misapplied, that is commingled with other funds) and to the extent that the said money or any portion thereof, either in its original or a substituted form, can be traced into the fund which came into the possession of the receiver, the appellee is entitled to a preference over the general creditors." (Citing the Titlow, Schuyler and Brennan cases, *supra.*)

The court held in the Centralia case that there was no proof that claimant's moneys ever came to the Centralia bank or were traceable to any fund that came to the receiver's hands, and, therefore, there could not be any recovery upon the trust theory. How this case applies to the facts of the instant case, we cannot conceive.

The case of *Farmers National Bank of Burlington* v. *Pribble*, 15 Fed. (2nd) 175, reannounced the rule stated in *Empire State Surety Co.* v. *Carroll County*, 194 Fed. 593, and in the other cases heretofore referred to. However, it reversed the lower court because *there was no proof that any of the complainant's money was ever received by the Farmers Bank and therefore, of course, no proof of facts supporting a presumption that any part of plaintiff's money came into the hands of the receivers.*

Some point is made by the counsel for petitioners and also by counsel for *amicus curiae* Missouri Pacific Railroad Company that the author of the opinion of the Circuit Court of Appeals in this case and one of the concurring judges therein concurred in the opinion of the same court in the Pribble case. Strangely, they seem to get some consolation from this fact, but all the fact indicates is that Judge Kenyon and Judge Stone were applying equitable rules to entirely different facts in the two cases. Under the facts in the instant case, the overcharges were deposited in various banks with moneys belonging to the railroad company. The railroad company always had on hand, in cash, more than the amount of the intervenor's claims. It is true the railroad company constantly withdrew the money it had on deposit in the banks but it is equally true that it constantly replenished the accounts of the banks in sums equal to the withdrawals. The railroad company turned over to the receivers really over six hundred thousand dollars in cash and the court, in both the instant case and in the Love case, held that presumptively the intervenor's money was in the fund turned over to the receivers. It is true that Judge Kenyon in this case held that the intervenor's money was not earmarked and could not be traced into any distinct fund in the

hands of the receivers but that is not necessary in this case, or in any case.

In the Love case, the court said:

> "(1) The question now might be properly asked, to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor the Frisco Company itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the Corporation Commission, to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of freight. The shippers not only paid the lawful charge. but they did more. They paid an excessive charge. That payment was an illegal exaction, and, as against the railroad company, and volunteers, like the receivers, the money belonged to the shippers after the payment the same as before. It will be presumed that it was a part of the money in the treasury of the company which passed to the receivers. That money came into the hands of a court of equity. What ought such a court to have done with it? Surely it could do nothing but direct that it be returned to the shippers to whom it belonged. It having been paid to the bondholders, or for permanent betterment of the property for their benefit through the agency of a court of equity, that court, as a court of conscience, can do no less than direct its restoration."

Counsel for both the petitioners and for the Missouri Pacific Railroad Company seek to distinguish the Love case from this case. Counsel for the Missouri Pacific Railroad Company make a strange distinction indeed. They say that before the charges in the Love case were collected, it had been adjudicated that the money belonged to the shippers and the carrier merely collected it under the protection of supersedeas bond and not with any lawful claim

to title. They say, too, that since the claims in the Love case accrued within six months from the date of the receivership, specific tracing of funds was not necessary. It is manifest that neither counsel for petitioners nor for the Missouri Pacific Railroad Company understand the Love case.

Under the law of Okahoma, the Corporation Commission was given power to fix intrastate rates. By various orders, the Commission prescribed certain rates for the transportation of freight, considerably less than the rates then being charged by the carriers in Oklahoma. Under the law of Oklahoma, when rates are thus prescribed by the Commission, the carriers have a right to appeal direct to the supreme court of the state from the orders of the Commission and by giving a bond, they supersede the rates prescribed by the Commission and complained of by the carriers. In the Love case, appeals from the orders of the Commission were taken by the St. Louis and San Francisco Railroad Company and bonds were given as required by the Oklahoma statute and the rates prescribed by the Commission were thereby superseded. The Supreme Court of Oklahoma decided that the rates prescribed by the Commission were in some respects too low and that the rates fixed by the Railroad Companies were too high, and fixed the rates covered by the orders of the Commission at slightly more than the rates prescribed by the Commission but considerably less than the rates charged by the carriers. Therefore, while the carriers were collecting the excessive rates between the time that the orders of the Commission were made and the time they put the new rates as prescribed by the supreme court into effect, they violated only their common law duty to charge just and reasonable rates. In the instant case, the Railroad Com-

pany violated not only (1) its common law duty but it violated (2) Section one of the Act to Regulate Commerce and it acted (3) in the teeth of the order of the Commission finding that the rate that it was exacting was unreasonable and unjust.

It is true that in the Love case, the Railroad Company kept a record of the freight movements made between the date of the orders of the Commission and the date of the judgment of the supreme court, but how does that fact distinguish the Love case from the instant case? The Railroad Company did in the Love case what it did in this case. It commingled the shippers' money with its own. The record of the shipments afforded a means of determining the amount of the illegal exactions. Here the amount of the illegal exactions has been determined by the finding of the Interstate Commerce Commission, by the District Court of the United States for the Western District of Missouri and by the judgment of this court.

The case of *Dayton-Goose Creek Ry.* v. *U. S., Interstate Commerce Commission, et al.,* 263 U. S. 456, decided by this court January 7, 1927, is by analogy an instructive case on this question of the relationship between a shipper from whom unreasonable and unjust rates have been exacted and the carrier exacting them under Section 6 of the Act, and of the effect of Section 15 (a) of the Act to Regulate Commerce, added to the act in 1920.

It was contended in that case by the Railroad Company that its income was derived from the transportation of freight and passengers; that the rates so collected were fair and reasonable to the shipper and were the rates published under Section 6 of the Act; that its earnings from such rates were the private property of the Railroad Company which could not by Congressional enactment, or other-

wise, be made a trust fund for the United States or for any other purpose without doing violence to the Fifth Amendment to the Constitution. In other words, while it was admitted that a carrier had "no right to collect or to demand of the shipper a rate that" was not in and of itself reasonable for the service, yet, since, as was contended, it obtained the legal and equitable title to the earnings which were derived from legally published rates which were at the same time reasonable and just to the shipper, Congress could not take such earnings from it without violating the Fifth Amendment to the Constitution, because the placing of an undue limitation upon the use of property was equivalent, under the Constitution, to taking of property without due process.

Paragraph five of Section 15 (a) declares that because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States.

The court, on this proposition said (l. c. 484):

> "We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation, that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. *Though in its possession, the excess never becomes its property and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to ren-*

der the recapture of it by the Government a taking without due process" (italics ours).

By a parity of reasoning and by virtue of Section one of the Act, which is declaratory of the common law, when a carrier exacts from a shipper an excess over a just and reasonable rate, such excess never becomes its property and the carrier accepts custody of such excess with the understanding that it has no right to take or hold more than a just and reasonable rate. If, because of Section six of the Act, a carrier obtained both the legal and the equitable title to an unjust and unreasonable rate or to a product of all of its rates in excess of a reasonable return, then neither the Commission nor Congress would have power to take such excess away from it without compensation.

By a consideration of the whole act to regulate commerce and by a consideration of the basic rights of the shipper and the carrier and from the very necessity of things, unjust and unreasonable, and therefore unlawful, exactions should be restored to the shipper whether there has been a prearranged reorganization receivership or not. Thus, the law fixing the rights and obligations of the carrier, the individual shippers and the public will be observed.

It is not so long ago that favorite shippers could put competitors out of business because they were able to obtain better rates, either by rebates or by discriminations, than their competitors. Suppose two competing shippers on two competing railroads—because of the publication of an unjust and unreasonable rate, unlawful exactions in large amounts are made from both shippers. Both shippers, after the procedural steps in the Interstate Commerce Commission have been taken, obtain judgments against the respective railroads for the restoration of the excess over a

just and reasonable rate. One of the railroads goes into a pre-arranged, consent receivership for the purpose of reorganizing. The other road does not. One shipper has restored to him in full the moneys illegally exacted from him. The reorganized railroad says to the other shipper—"No, we have gone into a court of equity and you can only share potluck with our general creditors who voluntarily became creditors." In such a case, what becomes of the uniformity which was one of the primary purposes of the act to regulate commerce? The answer is manifest.

We will not be betrayed into making invidious comparisons between Judge Kenyon and Judge Sanborn, as do counsel for the Missouri Pacific Railroad Company. We have the greatest respect for both of those learned judges. We can say this, however, with perfect propriety, that the opinion of Judge Kenyon, in this case, reflects a court of conscience working at its best. Judge Kenyon says: "Every consideration of equity and fair dealing demands that these claims should not be lost in a labyrinth of technicalities." The principle underlying this point of view should motivate every court of equity. It motivated the court in the case of *Commonwealth ex rel.* v. *Scott*, 112 Kentucky 252, wherein it is said:

> "But it will be noted that these arguments emanate from those whose interest and effort it is to defeat the action; to defeat the recovery; to defeat all recovery of their client. From that standpoint it is not criticised. But the court must look beyond this position. They cannot be satisfied with considering merely reasons why it should not be done, but must look also to those why it should be. Conceded a tax wrongfully levied and collected of a community, in violation of the Constitution. The citizen has paid it promptly, it being mingled with legal taxes, which should be paid promptly that Government might be supported. The sum of such illegal tax is in the hands of the collector or county

court. The citizens who paid it, not the municipality nor the collector, are entitled to it. Question for the courts: How to quickly, justly, inexpensively restore to the citizen his own? Now, if either form or substance of right must be sacrificed or one made to conform to the other, will the courts, in this day of practical action, hesitate as to which will be made to yield? As justice is the end and the procedure the means, we may well regulate the latter to attain the former."

IV.

Without reference to their other equities, intervenors are entitled to recover these excess charges from the new company, the St. Louis-San Francisco Railway Company, under the rule announced in the case of Northern Pacific Railway Company v. Boyd, 228 U. S., and other cases to the same effect, supra, relating to the right of a creditor to recover against the reorganized company, where the stockholders of the original debtor company have been given an interest in the reorganized company.

On this point we wish to call attention to the three following cases which are apposite:

Central of Georgia Railway Company v. *Paul*, 93 Fed. Rep. 878 (C. C. A., 5th Cir.).

Guardian Trust Company v. *Cambria Steel Company et al.*, 210 Fed. 696, l. c. 721 (C. C. A., 8th Cir.).

Walden v. *Bodley*, 14 Pet. 164, 10 L. Ed. 398.

In the case of *Central of Georgia Railway Company* v. *Paul*, Mrs. Paul intervened in the receivership case of the Central Railroad and Banking Company of Georgia, apparently after the property of that company had been sold under foreclosure. The theory of her bill of intervention was that as a stockholder of one of the subsidiary companies of the Central Railroad and Banking Company of Georgia, she was entitled to dividends on stock of such subsidiary com-

pany, which had been accruing, during a period of twenty years prior to the receivership; that the dividends so due to her constituted a trust fund, which, prior to the receivership, was held by the railroad company, and, since that time, by the Receivers and that she had an equitable lien upon the property and assets of the Central Railroad Company, which was superior to that of all other persons. In its answer, the defendant admitted that the amount of dividends were correctly stated in the intervention, but denied that the dividends were ever held as a trust fund. After announcing the doctrine underlying the decision in the case of *Northern Pacific Railway Company* v. *Boyd, supra,* the court, through Judge Pardee, stated on p. 885 of the opinion:

> "In one of the many orders issued by the court in the liquidation proceedings was an invitation to the general creditors of the Central Railroad and Banking Company of Georgia to intervene and assert their claims against the funds derived from the sale of the 'overflow property,' in pursuance of which the present appellee intervened, asserting her claim. *To recover the entire amount of her demand from the new company, on the view herein presented, she might have been driven to a bill in equity; but as there has been a full hearing in the present proceedings, and the appellant has been permitted to make a full defense, and as the decree appealed from does full equity between the parties, it may well be affirmed without further pleading.* Taking this view of the case, it is unnecessary to consider whether there is any trust or other fund still under control of the court out of which appellee can be paid, or whether the appellee's claim is entitled to consideration as one in which a special or general deposit to her credit was made in the banking department of the Central Railroad and Banking Company of Georgia. The decree appealed from is affirmed" (italics ours).

In the case of *Guardian Trust Company* v. *The Cambria Steel Co. et al.*, the trust company was a creditor of the Kan-

sas City Suburban Belt Railroad Company. Under the reorganization plan adopted in the receivership of that company, and of the Kansas City, Pittsburg and Gulf Railway Company, the Southern Railway was organized to take over the Belt Company property, the railroad company property, and the property of a dock company at Port Arthur, Texas. The stockholders of all three of the defendant companies, including the Belt Company, were taken into the reorganized company, and participated in the stock of the reorganized company. The same doctrine as that applied in the case of *Northern Pacific Railway Company* v. *Boyd* was applied in this Guardian Trust Company case, and it was held that the Southern Railway Company was liable to the creditors of the Belt Company. The issues between the Southern Railway Company and the Trust Company were framed by an intervening petition, filed by the Southern Railway Company, and by an answer filed by the Trust Company. The Trust Company asked for no affirmative relief against the Southern Company. It only prayed that the bill of the Southern Company be dismissed. It was contended that the Trust Company was not entitled to a decree for the payment of its claim against the Southern Company because the Trust Company filed no cross bill and made no specific prayer for said relief in its answer. This court disposed of that contention against the Southern Company, and in opinion, l. c. p. 722, quoted from the case of *Walden* v. *Bodley*, 14 Pet. at p. 164, as follows:

> "It would be a reproach to the administration of justice if, in this case, the parties should be left by the decision of this court apparently as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction, and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities

of the parties before them, and, having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief."

On this point we also cite the following cases:

Guaranty Trust Company v. *Missouri Pacific Ry. Co.*, 238 Fed. 812, l. c. 814-816.
McDonald v. *Nebraska*, 101 Fed. 171, l. c. 177-182.
Chicago Ry. Co. v. *Howard*, 7 Wall. 392, 409, 74 U. S. 392, 409, 19 L. Ed. 117.
Louisville Trust Co. v. *L. N. A. & C. Ry. Co.*, 174 U. S. 674.

The last two of which are quoted *supra*.

V.

Intervenors are entitled to recover upon the theory of the rule underlying the right of preferential payment of claims for labor, supplies, etc.

The finding on this point and the reasoning of the Master's report are so persuasive that we have excerpted the same and incorporate it herewith in this brief (R. pp. 186-190).

The operating income of defendant railroad company from June, 1906, to May 27th was over $92,000,000.00. During the receivership the operating revenue largely exceeded the operating expense, including taxes. The receivers turned over to the railroad company over $5,000,000.00 after paying out large sums of money from operating income as interest on bonded indebtedness and for betterments to the road and to equipment and for the purchase of new equipment.

Equity regards the substance and not the form. These claims represent money illegally exacted from the shippers.

They are not and never have been voluntary creditors of the defendant railroad. The test of the preferential equity of a claim of this kind is its consideration. The consideration for those claims is the money which the railroad company wrongfully and unlawfully obtained from the shippers. Money, even more than supplies, labor, etc., is necessary for the ordinary operation of a railroad in the usual course of its business. Freight rates are the lifeblood of railroad operations. Without them no railroad could own a wheel, much less turn one. Under both reason and authority these claims are preferential under this rule. As was said by the Circuit Court of Appeals in the case of *Love* v. *North American Company*, in which claims facts identical with the facts in this case were involved:

> " 'Petitioner's claim also comes within the rule which underlies the right to a preferential payment. Freight rates are the lifeblood of railroad operation. It will not be contradicted that if there were no freight rates paid in the United States not a wheel would turn on any road. What does the law say in regard to the allowance of preferences? We accept the laws as established by the Supreme Court of the United States and by this court, as follows:
>
> 'The class of claims which under the decisions of the supreme court may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to claims incurred for the current expenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business for labor, supplies and like things necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appoint-

ment of the receiver, the claim may be preferred in payment, otherwise it may not be. * * *

'We think that what has been heretofore said establishes that the claim of the shippers is a claim incurred "for the current expenses of the ordinary operation of the railroad in the usual course of business of the road." On principle it cannot be distinguished from payments to sureties who have signed bonds to stay the execution of judgments and claims for holders of unused tickets for refunds and many other like charges which are habitually allowed and have been allowed in the receivership of the Frisco Company.' "

It is urged by learned counsel for the defendant and the railway company that the bondholders received no benefit from these illegal exactions. It seems to the Master that it might as fairly be said that the bondholders received no benefit from the legal freight rates collected by this company. While it must be presumed under the facts shown that the shippers' money always remained in the treasury of the company, yet the shippers' money operated to swell the funds in the treasury of the defendant, and thus made it possible or at least aided in making it possible for the bondholders to receive the interest on their bonds.

It is again urged that the preferential allowance of these claims would impair the vested interest of the bondholders. Surely it cannot be reasonably claimed that the bondholders contracted for the security of unreasonable, unjust and unlawful freight charges. When they took their bonds they took them with the law written into them which forbade the charging of an unreasonable and unjust freight rate. It follows that the bondholders acquired no interest of any kind in these excessive charges. Therefore, the preferential allowance of these claims takes from the bondholders nothing to which they are entitled.

It is further urged by the defendant railroad and the railway company that under the authority of the case of *Chicago & Alton Railroad Company* v. *U. S. & Mex. Trust Co.,* 225 Fed. 940, these claims cannot be given preferential allowance. In the opinion of the Master that case, except to the extent that it announces the rule underlying the preferential equity of claims of this kind, has no application to this case. In all respects where that case is applicable to this case it is in harmony with the Love case. In that case Chicago & Alton Railroad Company was attempting to have allowed as a preferred claim car repair balances and money paid for the Orient Railroad for fuel and for the Orient's proportionate share of overcharge and loss and damage claims on interline shipments of freight received by the Chicago & Alton from the Orient. In that case there was no surplus income and no diversion of income. The Chicago & Alton was not a shipper from whom the Orient had unlawfully exacted freight rates. It was a carrier and had a balance due it under some interline agreement. It had paid to others some overcharges of some kind, part of which were chargeable to the Orient. Under the authority of the Love case the claims involved in the Chicago & Alton would not be entitled to preferential allowance.

It is contended by the defense that interveners' claims are not preferentially allowable under this rule in any event because they accrued more than six months prior to the appointment of the receivers. The Master cannot agree with this contention. It must be borne in mind that these interveners are not voluntary creditors. It must also be borne in mind that while the shippers' causes of action accrued at the time the illegal exactions were made, yet

their rights of action did not accrue until the Interstate Commerce Commission acted in January, 1914. Their rights of action did not become complete until June 15, 1914, which was the limit of time given by the Interstate Commerce Commission for the defendant to pay these claims. In the case of *Love* v. *North American Company, supra,* the six months rule was not technically applied. In the Love case the orders of the Corporation Commission fixing the rates were made on July 3, 7 and 31 and on September 14, 1911. The appeal from the orders taken by the railroad company was not decided until December 5, 1912. The judgment of the supreme court made the rates approved by it effective as of the dates of the original orders. Therefore, part of the overcharges in the Love case were collected as much as twenty months before the receivership.

However, the six months rule is not an inflexible rule. The period before the receivership in which claims of this character must accrue depends upon circumstances. The six months period is usually fixed because usually that is a reasonable period, but it is discretionary with courts to allow a longer period if circumstances warrant it. The time must be reasonable, and what is a reasonable time depends upon the facts of each particular case.

> *North American* v. *Lamont,* 69 Fed. 496.
> *Southern Ry. Co.* v. *Carnegie,* 76 Fed. 496.
> *Blair* v. *Ry. Co.,* 22 Fed. 471.

Mr. Justice Brewer says in *Blair* v. *R. R. Co.,* 22 Fed. 471:

> "There is no arbitrary time prescribed, and it should be only such reasonable time as, in the nature of things and in the ordinary course of business, would be sufficient to have such claims settled and paid.

> Six months is the longest time I have noticed as yet given. Ordinarily I think that is ample. Perhaps, in some large concerns, with extensive lines of road and a complicated business, a longer time might be necessary."

Where equity seemed to demand it, the federal courts have not hesitated to depart from the short six months rule. In *Atkins* v. *Railroad Company,* 3 Hughes 307, a claim which accrued twenty-two months before the receivership was allowed. In *Hale* v. *Frost,* 99 U. S. 389, a three-year period was allowed. In *Burnham* v. *Bowen,* 111 U. S. 776, eleven months was allowed. In *Union Trust Company* v. *Morrison,* 125 U. S. 591, a three-year period was allowed. In *New York Guaranty Trust Company* v. *Ry. Co.,* 83 Fed. 365-370, a claim for cable delivered twenty-six months before the receivership was allowed. In that case the court said:

> "The time that elapsed between the delivery of the cable and the appointment of the receiver by the state court would therefore be about twenty-six months, or a little over two years. But it is to be observed that the intervener began suit in the state court of Washington before the receiver was appointed, on October 5, 1893, which would be about twelve months after the delivery of the cable. It recovered judgment on April 3, 1896, which was subsequent to the appointment of the receiver by the state court. The period of time that transpired between the time that the intervener instituted its action and the appointment of the receiver cannot properly be included in this computation of time. Such delay as there was, incidental to the proceedings in the state court of Washington, cannot be imputed to nor tend to the prejudice of the intervener's rights. Without elaborating upon the proposition any further, we are of the opinion that the claim for the cable in question should be made a preferred debt."

It is plain that whatever delay there was in this case, chargeable largely to the vigorous opposition made by the Railroad Company, cannot be imputed to or tend to prejudice the interveners in their rights. The Master rules this point against the defendant and the railway company.

There is no conflict between the Love case and the case of *Chicago & Alton R. R. Co.* v. *United States & Mexican Trust Company, et al.,* 225 Fed. 940, upon this point. In that case, the complainant was seeking to recover for car repairs, loss and damage claims on shipments of freight and overcharges. The complainant's claims in that case amounted to nothing more than simple debts of the Orient Company for labor done and for money advanced by the intervenor for the mortgagor company (225 Fed. l. c. 943). The question of the right of a shipper to recover overcharges was not involved in any way, shape or form in that case.

As we have heretofore stated, rules of equity are not inflexible but are elastic and adapt themselves to the particular right to be recognized and enforced.

As we have heretofore stated, the principle commonly called the six months' rule is of modern origin. It was considered inequitable that persons furnishing supplies or labor to a railroad company, and presumptively contracting for payment out of current income, should lose their money because of the intervention of a court of equity in the management of a railroad property. The courts reasoned that the bondholders of a railroad company impliedly contracted that persons furnishing supplies within a reasonable time before the receivership would be paid out of current income and would be paid out of the corpus of the property if current income were diverted. What was

a reasonable time within which such claims could accrue and be recognized depended upon the facts and circumstances. It is usually thought that if a claim is more than six months old, the creditor did not even impliedly contract for payment out of current income but sold to the Railroad Company on the general credit of the Railroad Company. In this case, the Railroad Company obtained the intervenors' money against their consent. The reasons which underlie the rule under which supply creditors are entitled to preferential payment should certainly apply to these forced claimants.

VI.

A court of equity, as a matter of public policy, will order the overcharges in question repaid to the interveners, the shippers and representatives of shippers of live stock.

A court of equity, as a matter of public policy, will order these overcharges repaid to the shippers. In charging and collecting freight rates a carrier is exercising a prerogative of sovereignty. It owes a public duty to charge only just and reasonable rates.

> "A franchise which, in England, is a branch of the royal prerogative, subsisting in the hands of a subject, in this country can only be derived from the Legislature. Franchises are here, as in England, privileges of the sovereign in the hands of the subject. Whoever claims an exclusive privilege with us must show a grant from the legislature. A privilege or immunity of a public nature, which cannot be legally exercised without legislative grant, is a franchise. * * *
>
> "Inasmuch as it is the duty of the Government, with respect to the welfare of the public in general and of trade in particular, to provide safe and commodious ways of communication, whence flows the right of the state to oblige those who make use of the ways it provides to contribute to the expense of making and main-

taining them, *i. e.*, the right to levy tolls, it follows that the right to make roads and levy tolls is a prerogative of sovereignty, and, in the hands of a subject, is a franchise, which cannot be legally exercised without legislative authority. * * *

"This franchise of the defendant is a privilege of the sovereign in the hands of a subject. The subject is, indeed, in the present case, an artificial being; but the sovereign might have placed this privilege in the hands of a natural person, and it might have been his property, as it is the defendant's property."

Blake v. *Railroad*, 19 Minn. 418.

See, also, *Morgan* v. *Louisiana*, 93 U. S. 217.

Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts, and "it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interest of the public in the progress of trade and traffic by new methods of intercourse and transportation." See, also, the case of *Southern California Railway Company* v. *Rutherford et al., supra,* and the case of *Mercantile Trust Company* v. *St. Louis & San Francisco Railroad Company,* 69 Fed. 193.

However, this point is also conclusively settled by the case of *Love* v. *North American Company,* 229 Fed., l. c. 107.

In the case of the *Mercantile Trust Company* v. *St. Louis & S. F. Ry. Co.*, 69 Fed. 193, l. c. 198, Judge Caldwell trenchantly said:

"But it is believed this is the first instance in which a court of equity has been asked to become, in effect, something bordering very closely on a receiver of stolen goods, and urged to hold the ill-gotten gains in trust for the guilty party, and refuse to make restitution even of

the smallest portion of them to the persons from whom they were unlawfully taken. High considerations of public policy, not less than the plainest principles of equity and justice, demand that the property of the defendant company in the custody of the court as a trust fund should be made to respond to the payment of these judgments. And if the lien of the judgments had expired and the general order relating to the payment of debts did not comprehend them under the admitted facts of the case a special order would have to be made for their payment."

The rule thus announced by Judge Caldwell was re-announced by this court in the Love case, 229 Fed., l. c. 107, as follows:

"There is another aspect in which petitioners' equity appears equally strong. The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers. It was a public duty owing to the state whose orders had been superseded. It is a duty which this court and the supreme court have always been scrupulously careful to safeguard when superseding rates pending judicial inquiry as to their validity. It is a duty which a court of equity that has taken over the business of a public carrier, by means of a receivership, ought to be equally careful to enforce."

VII.

Neither the reorganization nor the trust fund theory is inconsistent with or abrogated by the remedy for the collection of overcharges prescribed by Section 16 of the Act.

It is urged by petitioners that, because of the provisions of Section 16 of the Act to Regulate Commerce, the status of interveners is that of general unsecured creditors, with no right to priority over anyone. Under this section of the act, if the Interstate Commerce Commission shall determine

that a shipper is entitled to an award of damages, it shall make an order directing the carrier to pay the sum to which the shipper is entitled on or before a day named. If the carrier does not comply with this order for the payment of money, then the shipper may file in the district court of proper jurisdiction, or in any state court of general jurisdiction, having jurisdiction of the parties, a petition setting forth the causes for which he claims damages and the order of the Commission in the premises. Such suit shall then proceed in all respects like other civil suits for damages, except that the order of the Commission is made *prima facie* evidence of the facts therein stated.

Does this section of the act make the shipper, as to unlawful exactions of freight charges, a general creditor of the carried against the shipper's will? The United States Circuit Court of Appeals held that it did not. This section does prescribe a remedy at law which the shipper must pursue. But it does not take away from him his equitable remedy to thereafter impress a trust, if the latter remedy is necessary in order that he may get back that which was unlawfully taken from him. Too much significance must not be attached to the word "damages." If a citizen is robbed of his money, he is damaged. If his property is taken away from him by fraud, he is damaged. If it is taken away from him by duress, he is damaged, and in all three cases he can sue the wrongdoer in tort for damages. He may also sue to impress a trust. The status of the interveners cannot be determined by stressing mere procedural terms. We must consider the substance, and not the mere form. We must look back to the facts which lie at the root of the transaction. It is the basic facts that must determine the rights of the intervenors and their remedies. We must not blind ourselves to the fact that the

claims of intervenors are claims due to the shippers for excessive charges paid by them to the Railroad Company for the transportation of freight.

It is urged by learned counsel for petitioners and by counsel for the Missouri Pacific Railroad Company, *amicus curiae,* that all the remedies of the shipper, except the remedy prescribed in section 16 of the act, are abrogated by the act. Section 22 of the act provides:

> "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

It is true that this section and section 9 of the act have been limited in their scope by the Supreme Court of the United States. The case of *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Company,* 204 U. S. 426, is the leading case on the interpretation of these sections. In that case the plaintiff brought suit to recover unreasonable freight charges without having secured any finding from the Interstate Commerce Commission as to the extent to which the rate was unreasonable and unjust. As has been heretofore stated, the purpose of the Act to Regulate Commerce was to secure uniformity of rates and to prevent discriminations of all kinds, as well as to prohibit the charging of unjust and unreasonable rates. The supreme court held that if shippers could invoke the aid of the courts without first going to the Interstate Commerce Commission, then one of the objects of the act—to-wit, the securing of uniformity—would be destroyed. One shipper might go into one court and secure a judgment. Another shipper, similarly situated, might go into another court and fail. Two shippers might appeal to the same court and get different results, depending upon the evidence presented.

Rebates could be secured by fictitious suits, and all of the evils of this character which the act sought to prevent would be revived.

A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that commission and promulgated as provided by the act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violation of the act conferred by section 9 * * * must be confined to such wrongs as can consistently with the context of the act be redressed without previous action by the commission; and the provision of section 22 that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute. In other words, the act cannot be held to destroy itself.

204 U. S., l. c. p. 446.

It is, therefore, clear that those common-law remedies, the continued existence of which in the shipper would be absolutely inconsistent with the act, are abrogated. However, it is equally clear that those common-law remedies, the continued existence of which would not be inconsistent with the act, are reserved to the shipper. In considering

this proposition it must be borne in mind that appeals by implication are not favored. This rule is clearly stated by the supreme court in this Abilene Cotton Oil Company case:

> "In testing the correctness of this proposition, we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common-law right existing at the date of its enactment unless that result is imperatively required; that is to say, unless it is found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

Of course, there is nothing in the remedy these interveners are now pursuing which is inconsistent with the Act to Regulate Commerce, or which is repugnant to the Act to Regulate Commerce. On the contrary, the existence of this remedy in this case is necessary in order to bring about and insure the uniformity which the Act to Regulate Commerce was designed to secure. The carriers who remained solvent repaid to the shippers the illegal exactions. This remedy puts the carrier in this case on the same footing with the other carriers.

Intervenors contended, and still contend, that there was nothing in the Act to Regulate Commerce depriving them of the remedy pursued in this case, nor is there anything else depriving them of such remedy.

The basic theory of the trust fund doctrine is the right to recover money wrongfully and unlawfully and by duress collected (39 Cyc. 591; *Oelrichs* v. *Williams* and *Oelrichs* v. *Spain*, 15 Wall. 221, 21 L. Ed. l. c. 44) and the fundamental legal maxim is, "*Ubi jus, ibi remedium,*" and, "Equity will not suffer a wrong without a remedy."

Broom on Legal Maxims (8th Ed., p. 101 *et seq.*), citing the celebrated case of *Ashby* v. *White,* 2d Ld. Ryam. 953, and also the famous opinion of Chief Justice Marshall in the case of *Marbury* v. *Madison,* 1 Cr. 137, 2d L. Ed., p. 60.

In Pomeroy's Equitable Jurisprudence, Vol. I, Sec. 423, this great authority on equity jurisprudence discusses the above corresponding equity maxim and points out the universality of its application.

Its application has been so often exemplified that it would be useless to attempt to give more than a few controlling authorities.

> *Toledo, A. A. & N. M. Ry. Co.* v. *Penn. Co. et al.*, 54 Fed. 746, l. c. 751, 752.
> *Southern California Ry. Co.* v. *Rutherford, et al.*, (Circuit Court, Southern District of California, June 30, 1894), 62 Fed. l. c. 797, 798.

The federal and state courts have often invoked and applied this maxim of equity, and the other maxims, namely, "Equity delights to do justice and that not by halves," or, as more commonly expressed, "Equity will do complete justice." Again, "Equity regards that as done, which ought to be done"; and "Equity regards substance rather than form"; and "Equity imputes an intention to fulfill an obligation." In equity there is no wrong without a remedy.

> *Harrigan* v. *Gilchrist,* 99 N. W. 909.
> *Mercantile Trust Co.* v. *St. Louis & San Francisco Ry. Co., Ogden et al. Intervenors,* 69 Fed. 193.
> *Sweet* v. *The Montpelier Savings Bank & Trust Co.,* 69 Kan. 641 (77 Pac. 538).
> *Mathews* v. *Forslund,* 112 Mich. 591.
> *Barksdale et al.* v. *Finney et al.,* 14 Grattan, 338.
> *Williams* v. *Young,* 81 Atlantic 1118.
> *Trader's Bank* v. *Fraser,* 162 Mich. 315, l. c. 318.
> *Converse* v. *Sickles,* 44 N. Y. Supp. 1080 (affirmed in 161 N. Y. 666).
> *Sugar Refining Company* v. *Fancher,* 145 N. Y. 552, l. c. 561.

The cases just cited also announce the proposition that a judgment at law is, in many cases, not such an election of the remedy as will preclude a bill in equity to impress a trust, because there is no inconsistency whatever between the two proceedings.

In pursuing the remedy pointed out by Section 16 of the Interstate Commerce Act, intervenors manifestly made no election, because that was the only remedy available, and because that remedy had to be pursued to its final conclusion before any other remedy became available (*Southern Pac. Co.* v. *Goldfield Co.*, 220 Fed. Rep. 14, l. c. 18).

Since there was no freedom of choice, the doctrine of election of remedies cannot apply in this case (20 C. J., p. 21).

These points are so well demonstrated in the opinion of the United States Circuit Court of Appeals (R. pp. 764-767) that no further discussion is needed.

VIII.

The claims of intervenors for said excess charges should be paid with interest from the date of their illegal collection.

> *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, l. c. 238, 239, 240,

where the court holds:

> "It has been the uniform practice of the Commission to recognize as an element of the damages, loss of interest on charges unlawfully exacted; and, in ordering reparation, it has usually included as a part of the damages such interest from the date of the payment."

Citing many cases of this court and of the Commission in the decision and in Notes 10 and 11 supporting this conclusion. This case conclusively settles the question of interest. This rule applies both to the trust fund theory and the

reorganization theory of liability. Petitioners' cases cannot apply because in this case, after a three-year receivership, a delay of eleven years has been caused by the present railway company.

IX.

Interveners are entitled to recover attorneys' fees taxed as costs in the litigation in the District Court of the United States for the Western Division of the Western District of Missouri.

For the reasons assigned in Point IV of this brief, intervenors are entitled to payment of these costs from the defendant railway company. They are also entitled to recover payment thereof for another reason. When the receivers were appointed they were, by the order of the District Court, authorized to

> "institute and prosecute such suits in their own names as receivers or in the name of the company, as their attorneys may advise; to defend such suits as may be brought against them and those now pending or hereafter brought against the company which affect or may affect the property of which they are now or may become receivers."

Pursuant to this order the receivers, through their attorneys, appeared in the cases in the District Court of the United States for the Western Division of the Western District of Missouri and conducted the defense of the cases therein. They appealed from the judgment of the District Court at Kansas City to the Circuit Court of Appeals. About the time of the appeal to the Circuit Court of Appeals the Railway Company took charge of the litigation and through its attorneys conducted the defense to these cases. Either the receivers or the railway company caused a surety com-

pany to make an appeal bond in the name of the defendant railroad company for thirty-five hundred dollars ($3500.00), conditioned that the defendant would answer for all costs if it failed to make good its appeal. All of the costs in these cases taxed against the defendant railroad company were incurred and made by the action of the receivers. Under these circumstances ought these costs in equity be paid by the receivers and, therefore, by the railway company?

We submit that these costs should be treated as part of the expense of the administration of the estate.

> "Equity delights to look behind the forms in which things are clothed, at the real substance of them."

While it may be that technically the receivers did not incur these costs, yet they did cause them to be incurred. They did this under the provisions of the order of their appointment. To all intents and purposes the district court, in which the receivership case was pending, conducted this litigation and caused these costs to be incurred. We earnestly insist that it would be very inequitable for a court of equity to cause these costs to be incurred and then refuse to compel its officers to pay them. Of course, if the receiver should pay them, then the railway company should pay them.

X.

The intervenors are neither precluded by laches from the recovery of these illegal exactions nor by any bar arising out of interlocutory orders or the final decree.

We cannot add anything to the argument of the Master (R. pp. 167-173) or to the argument of Judge Kenyon in the opinion of the circuit court of appeals (R. pp. 749, 755) on the question of laches.

So far as any bar arising out of the interlocutory orders or the final decree is concerned, counsel for petitioners mistate the rule (Petitioners' Brief pp. 49, 50). It is true that one who intervenes in an equity suit is bound by all previous orders to the same extent as if he had been a party to such suit when such orders were made, but that is not all. Such an intervenor has the *same rights* as if he had been a party at the time the orders were made.

In the case of *Swift & Co.* v. *Black Panther Oil Gas Co.*, 224 Fed. 20, l. c. 29, the circuit court said:

> "This general rule is that the intervener is in the same situation, bound by the same orders, *has the same right*, and is subject to the same estoppels as though he had been *a party from the commencement of the suit*" (italics ours).

In the case of *French* v. *Gapen*, 105 U. S. 509, this court said of an intervention filed after the sale and after the final decree:

> "To their intervention no exception is taken by any of the parties. They are, therefore, to all intents and purposes now to be treated as *though they had originally been made defendants and set up their demands*" (italics ours).

In the case of *Rice, et al.* v. *Durham Water Co.*, 91 Fed. l. c. 434, the court said:

> "Leave to intervene was by order and after intervention the new parties are treated, to all intents and purposes, *as if they had been original parties to the suit*" (italics ours).

If intervenors have the same right and are subject to the same estoppels as though they had been parties from the commencement of the suit, then, of course, they have the right to have their cases tried as if their interventions

had been filed on the day the bill was filed by the North American Company. They are in exactly the same position as they would have been in had their interventions been on file but undisposed of at the time the orders referred to by counsel and the final decree were entered. The order granting them leave to intervene was not excepted to and if, as was stated by this court in the French case, *supra,* they are now to be treated as though they had originally been made defendants and set up their demands, they are, of course, unaffected by the interlocutory orders or the final decree.

Judge Kenyon, in the opinion of the United States Circuit Court of Appeals erroneously decided this proposition and his opinion is in conflict with the case of *Swift & Co.* v. *Black Panther Oil Gas Co., supra,* and with the case of *French* v. *Gapen, supra,* decided by this court.

XI.

Construction of the word "arise" in the final decree.

The decision of the circuit court of appeals that intervenors' claims "arose" after the entry of the final decree, and that they were not precluded by the final decree and the order of confirmation of sale from asserting said claims, is correct on this point. Opinion of the United States Circuit Court of Appeals (R. pp. 755-760) 14 Fed. 2nd, l. c. 291-293, where the court reviews the contention of petitioners on this point at length, states the applicable facts, holds that the purchaser of the property, the railway company, expressly agreed, under the order

of court, to pay the claims of intervenors, if established, and cites many applicable authorities as to the meaning of the term, "arise." We can add nothing to the opinion on this point.

United States v. *Heth,* 3 Cranch, 398, 413 (2 L. Ed. 479).
Van Meter v. *Coal Mining Co.,* 88 Iowa, 92, 98, 55 N. W. 106, 108.
Doughty v. *Funk,* 15 Okl. 643, 84 P. 484, 4 L. R. A. (N. S.) 1029.
Macon Grocery Co. v. *Atlantic Coast Line R. Co.,* 215 U. S. 501, 30 S. Ct. 184, 54 L. Ed. 300.
In re Bogart, Fed. Cas. No. 1596.
Moran v. *Moran,* 144 Iowa, 451, 123 N. W. 202, 30 L. R. A. (N. S.) 898.
Love, et al. v. *North American Co., et al.,* 229 F. 103, 106, 143 C. C. A. 379, 382.
Southern Pacific Co., et al. v. *Darnell,* 245 U. S. 531, 38 S. Ct. 186, 62 L. Ed. 451.
Louisville Cement Co. v. *Int. Com Comm.,* 246 U. S. 638, 38 S. Ct. 408, 62 L. Ed. 914.

Conclusion.

We respectfully submit that the judgment of the United States Circuit Court of Appeals in this case should be affirmed.

Respectfully submitted,

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